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JOSEPH A. WALSH, II, CASB No. 143694
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JOHN C. COX, CASB NO. 197687
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DAVID TONG, CASB NO. 238971
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KEESAL, YOUNG & LOGAN
A Professional Corporation
Four Embarcadero Center
Suite 1500
San Francisco, California 94111
Telephone: (415) 398-6000
Facsimile: (415) 981-0136

Attorneys for Defendants
REGAL STONE, LTD. and FLEET MANAGEMENT, LTD.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M/V COSCO BUSAN, LR/IMO Ship. No.
9231743 her engines, apparel, electronics,
tackle, boats, appurtenances, etc., *in rem*,
THE SHIPOWNERS' INSURANCE &
GUARANTY COMPANY LTD., REGAL
STONE, LIMITED, FLEET
MANAGEMENT LTD., and JOHN COTA,
in personam,

Defendants.

Case No. C 07 06045 (SC)

**DECLARATION OF JOSEPH A.
WALSH II IN SUPPORT OF REGAL
STONE, LTD. AND FLEET
MANAGEMENT, LTD.'S MOTION TO
DISMISS, OR IN THE ALTERNATIVE,
STAY PROCEEDINGS [FRCP 12(b)(1)]**

Date: April 25, 2008

Time: 10:00 A.M.

**Dept. 1 - The Honorable Samuel
Conti**

I, JOSEPH A. WALSH II, declare as follows:

1 1. I am an attorney at law licensed to practice before this Court and am a
2 member with the law firm of Keesal, Young & Logan, attorneys for Defendants REGAL
3 STONE LIMITED and FLEET MANAGEMENT LTD in the matter entitled *United*
4 *States of America v. Regal Stone Limited, et al.*, C 07 06045 (SC). I have personal
5 knowledge of the facts set forth below, and, if called upon to testify as a witness, could
6 testify competently thereto.

7 2. In admiralty and maritime cases, a claimant who may have a maritime lien
8 against a vessel, *in rem*, may seek to arrest the vessel as security for its claims. This
9 process is provided for in the Federal Rules of Civil Procedure, Supplemental Rules For
10 Certain Admiralty and Maritime Claims, Rule E. However, it is not necessary that an
11 actual lawsuit be commenced in order to assert lien rights in support of a demand for
12 security. In fact, as a means to avoid formal arrest of a vessel, it is common practice for
13 Protection and Indemnity underwriters of vessels such as the COSCO BUSAN to issue
14 security in the form a Letter of Undertaking when it is requested by a lien claimant,
15 without first requiring that a lawsuit be filed.

16 3. In this matter, a lawsuit was first filed by the United States of America on
17 November 30, 2008, and a subsequent demand for security, in lieu of arresting the
18 vessel, was made.

19 4. Attached hereto as Exhibit "A", is a true and correct copy of a Letter of
20 Undertaking dated December 12, 2007, issued on behalf of the Steamship Mutual
21 Shipowners Association of Bermuda in favor of the United States of America for its *in*
22 *rem* civil claims relating to the COSCO BUSAN incident in the amount of
23 \$79,500,000.00.

24 5. In the days following the incident, Defendant Regal Stone undertook to,
25 and advised, Federal and California Natural Resource Trustees of its desire to
26 participate and fund the initial phases of their natural resource damage assessment.
27 Attached hereto as Exhibit "B", is a true and correct copy of an initial interim agreement
28 dated November 13, 2007 which obligates Defendant Regal Stone, as the Responsible

1 Party, to fund the Trustees reasonable assessment costs. In addition, the Responsible
2 Party initially agreed to and has since pre-funded the United States Department of
3 Interior (DOI) with \$100,000.

4 6. The Responsible Party has subsequently advanced an additional \$400,000
5 to DOI upon its request to cover its continuing costs in conducting the current
6 assessment of natural resource injuries.

7 7. In addition to the advance of funds sent to the Department of the Interior,
8 and consistent with terms of the November 13, 2007 Agreement the Responsible Party is
9 now reviewing cost documentation submitted by that federal agency, and is also
10 reviewing partial cost claim documentation submitted by other Federal and State
11 Trustee Agencies.

12 8. The November 13, 2007 Agreement is open ended and stands in place until
13 either the Responsible Party withdraws from the agreement or until a more permanent
14 agreement is negotiated and executed. The Responsible Party is currently in the process
15 of negotiating a more permanent cooperative agreement with the Trustees for assessing
16 injury to natural resources.

17 9. Keesal, Young & Logan served as counsel of record for Unocal Corp and
18 ERST, Inc. in a lawsuit entitled *Unocal Corp. et. al. v. United States, et. al.*, (filed in the
19 United States District Court for the Central District of California, Western Division,
20 case no. 97-0024 RSWL). I served as trial counsel in that matter. In that case, the
21 United States of America challenged whether the United States District Court had
22 subject matter jurisdiction to rule on whether the United States was required to
23 reimburse Unocal for response costs it incurred in responding to a pipeline spill that was
24 subsequently found by a jury to have been caused solely by the negligence of a third
25 party. The United States took the position that the Oil Pollution Act ("OPA") did not
26 waive the United States sovereign immunity for a claim for reimbursement, and that the
27 United States District Court lacked subject matter jurisdiction to order the United
28 States to reimburse Unocal for those costs. True and accurate copies of the motion

1 papers filed by the United States in the Unocal case are attached as Exhibit "C" to this
2 declaration.

3 10. The District Court agreed with and granted the United States motion and
4 issued the attached order dismissing Unocal's claims for lack of subject matter
5 jurisdiction. A true and accurate copy of the Court's order is attached as Exhibit "D."

6 Executed this 21st day of March 2008, at Long Beach, California. I declare under
7 penalty of perjury under the laws of the United States of America that the foregoing is
8 true and correct.

9
10 /s/

11 JOSEPH A. WALSH II
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28

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SANDOR X. MAYUGA
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 NANCY HARRISS
 FRANCES L. KEELER

December 12, 2007

* ADMITTED IN ALASKA
 † ADMITTED IN WASHINGTON
 ‡ ADMITTED IN WASHINGTON & CALIFORNIA
 § ADMITTED IN ALASKA & CALIFORNIA
 * ADMITTED IN DISTRICT OF COLUMBIA & FLORIDA
 * REGISTERED FOREIGN LAWYER WITH THE LAW SOCIETY
 OF HONG KONG & ADMITTED IN NEW YORK
 * SOLICITOR ADMITTED IN ENGLAND, WALES AND NORTHERN
 IRELAND

ALL OTHERS ADMITTED IN CALIFORNIA

VIA HAND DELIVERY

United States of America
 c/o R. Michael Underhill
 Attorney in Charge, West Coast Office
 Torts Branch, Civil Branch
 7-5395 Federal Bldg., Box 36028
 450 Golden Gate Ave.
 San Francisco, CA 94102-3463

Re: United States of America v. M/V COSCO BUSAN, in rem; et al.
 U.S.D.C. Northern District, Case No. CV-07-6045
 Your Ref: 62-402
 Our File No.: 2418-229

Ladies and Gentlemen:

You have filed the foregoing suit (Case No. 07-CV-06045-SI; hereinafter, the "Civil Suit") seeking, inter alia, the arrest of the M/V COSCO BUSAN (IMO No. 9231743) (hereinafter the "Vessel"); now lying in San Francisco Bay, California, in connection with in rem claims asserted under the National Marine Sanctuaries Act, 16 U.S.C. § 1431, et seq., and the Park System Resource Protection Act, 16 U.S.C. § 19jj, et seq., for civil claims arising from the November 7, 2007 allision of the Vessel with the San Francisco-Oakland Bay Bridge and resulting oil spill (hereinafter the "Incident").

In consideration for your refraining from arresting the Vessel and refraining from further arresting or otherwise attaching or otherwise detaining the Vessel or any other vessel or property of her Owner or any other vessel or property of any company in the same or associated ownership, management or control in connection with civil claims, civil penalties, civil forfeitures, and civil causes of action arising from the Incident (collectively, "Civil Proceedings"), the undersigned Association hereby agrees and undertakes:

EXHIBIT A

SAN FRANCISCO OFFICE
 SUITE 1500
 FOUR EMBARCADERO CENTER
 SAN FRANCISCO, CA 94111
 (415) 398-6000
 FACSIMILE:
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 1029 WEST THIRD AVENUE
 ANCHORAGE, AK 99501-1954
 (907) 279-9696
 FACSIMILE: (907) 279-4239

SEATTLE OFFICE
 SUITE 1515
 1301 FIFTH AVENUE
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HONG KONG OFFICE
 1603 THE CENTRE MARK
 287 QUEEN'S ROAD CENTRAL
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 (852) 2854-1718
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United States of America
c/o R. Michael Underhill
U.S. Department of Justice
December 12, 2007
Page 2

Re: United States of America v. M/V COSCO BUSAN, in rem; et al.
U.S.D.C. Northern District, Case No. CV-07-6045
Your Ref: 62-402
Our File No.: 2418-229

1. To file or cause to be filed an appearance on behalf of the Vessel and a claim to said vessel on behalf of the Owner in the Civil Suit or such Civil Proceedings that you may commence against the Vessel in rem in the United States District Court for the Northern District of California or any other court, seeking in rem civil penalties, in rem civil damages, civil forfeiture or other in rem civil relief allegedly arising out of the Incident irrespective of the Vessel not being in the jurisdiction of the Court at the time (and without raising any defenses as to her absence from said jurisdiction).

2. In the event a final judgment (after final appeal, if any) be entered in your favor against the Vessel in rem in the United States District Court for the Northern District of California or other court as referenced in paragraph 1 above, then the undersigned Association agrees to pay and satisfy said final unappealable judgment up to and not exceeding Seventy-Nine Million Five Hundred Thousand United States Dollars (US\$79,500,000), inclusive of interest and costs, or any lesser amount decreed by the Court or settled between the parties without final judgment being rendered, provided always that such settlement has been made with the undersigned Association's approval.

3. Upon demand, subject to approval of the Court, cause to be filed a Bond in form and sufficiency of financial surety satisfactory to you or to the Court in the above amount and subject to the same terms and conditions set forth hereinabove, securing your claims in the Civil Proceedings.

4. In the event the Bond referred to in paragraph 3 is filed then the undersigned Association shall have no further obligation under paragraph 2 above.

5. This Letter of Undertaking is intended to place you in the same position to the extent herein provided as though an admiralty bond or other form of security in the customary form in the total amount of US\$79,500,000, inclusive of interest and costs, otherwise acceptable to the above-entitled Court, had been provided by the Owner of the Vessel in the Civil Suit, to prevent the Vessel from arrest and/or forfeiture.

It is expressly understood and agreed that this Letter of Undertaking pertaining to the Civil Suit and Civil Proceedings pertains solely and exclusively to

United States of America
c/o R. Michael Underhill
U.S. Department of Justice
December 12, 2007
Page 3

Re: United States of America v. M/V COSCO BUSAN, in rem; et al.
U.S.D.C. Northern District, Case No. CV-07-6045
Your Ref: 62-402
Our File No.: 2418-229

civil actions and, conversely, does not pertain to and/or affect any alleged or potential in personam criminal actions or criminal penalties or criminal fines (collectively, "Alleged or Potential Criminal Fines and Penalties") which potentially could be asserted by or on behalf of the United States. Accordingly, it is expressly agreed and understood that as a result of this Letter of Undertaking herein, no alleged or potential criminal penalties or criminal fines of the United States are affected, discharged, substituted for, and/or transferred to this Letter of Undertaking.

It is further understood and agreed that the signing of this letter by Keesal Young & Logan is not to be construed as binding Keesal Young & Logan, but is to be binding only upon The Steamship Mutual Underwriting Association (Bermuda) Limited. Neither this agreement nor obligations under it may be assigned without the written agreement of The Steamship Mutual Underwriting Association (Bermuda) Limited.

This letter is written entirely without prejudice to any rights or defenses which the said Vessel and/or Owner of the said Vessel may have, none of which is to be regarded as waived, except such defenses as might be predicated upon the fact that the Vessel was not actually seized.

Yours faithfully,

For: The Steamship Mutual Underwriting
Association (Bermuda) Limited

BY:



John D. Giffin

As Attorney-in-Fact for the above limited
purpose only, as per authority received from
The Steamship Mutual Underwriting
Association (Bermuda) Limited
December 12, 2007)

GRP: (1125098)

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November 13, 2007

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 OF HONG KONG & ADMITTED IN NEW YORK
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 IRELAND

ALL OTHERS ADMITTED IN CALIFORNIA

Charles McKinley
 Assistant Field Solicitor
 Office of the Solicitor
 U.S. Department of the Interior
 1111 Jackson Street, Suite 735
 Oakland, CA 94607

Katherine Verrue-Slater
 Staff Counsel III
 Department of Fish and Game
 Office of Spill Prevention and Response
 1700 K Street #250
 Sacramento, CA 95811

Chris Plaisted
 NOAA Office of General Counsel
 Suite 4470
 501 West Ocean Boulevard
 Long Beach, CA 90802

Re: *M/V COSCO BUSAN*- Oil Pollution Act: Funding for Joint
 Preassessment /Assessment Activities

Dear Counsel:

This is to confirm that Regal Stone Limited wish to participate with the Natural Resource Trustees (trustees) in their pre-assessment and assessment of injuries to natural resources resulting from the oil spill, involving the above-named vessel, which occurred in San Francisco Bay on November 7, 2007. In consideration of the trustees' agreement to allow Regal Stone Limited to participate cooperatively in these activities, pursuant to the Oil Pollution Act Natural Resource Damages Regulations, 15 CFR Part 990, Regal Stone Limited hereby agrees to pay the reasonable costs previously incurred and to be incurred by the Department of the Interior (including the Fish and Wildlife Service, the National Park Service, the Bureau of Land Management, the Office of Environmental Policy and Compliance, and the Office of the Solicitor) (DOI), the California Department of Fish and Game, Office of Spill Prevention and Response (CDFG), the California Department of Parks and Recreation (CDPR), and the National Oceanic and Atmospheric Administration (NOAA) for such activities.

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EXHIBIT B

Charles McKinley
Katherine Verrue-Slater
Chris Plaisted
November 13, 2007
Page 2

Re: M/V COSCO BUSAN- Oil Pollution Act: Funding for Joint
Preassessment /Assessment Activities

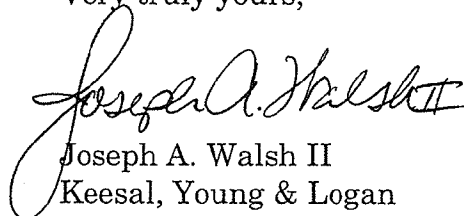
So as to avoid any potential for violation of the Anti-Deficiency Act, Regal Stone Limited agrees to provide within ten (10) days an initial payment of \$100,000 to the Department of the Interior for its costs incurred and to be incurred pursuant to instructions to be provided by DOI to Regal Stone Limited.

The trustees and Regal Stone Limited expect to negotiate and enter into a Cooperative Agreement for further specific, cooperative assessment activities. However, until any such Cooperative Agreement becomes effective, or until Regal Stone Limited provides written notice 15 days in advance, Regal Stone Limited's agreement to pay as contained in this letter shall remain in effect.

For purposes of this Agreement, and unless and until directed otherwise by Regal Stone Limited, all requests for reimbursement for these activities should be provided, along with supporting documentation, to:

Keesal, Young & Logan
400 Oceangate
Long Beach, CA. 90801
Attention: Joseph A. Walsh II (2418-229)

Very truly yours,



Joseph A. Walsh II
Keesal, Young & Logan
As Attorney in Fact
for Regal Stone Limited

JAW:tw (KYL_LB1119521)



U.S. Department of Justice

Environment and Natural Resources Division

LJG:CLR

DJ # 90-5-1-4-485

Environmental Defense Section

Washington, DC 20026-3986

May 21, 1997

VIA FEDERAL EXPRESS MAIL

Frank E. Goodroe, Clerk
United States District Court
Central District of California
U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

RE: Unocal Corp., et al. v. United States, et al.,
Case No. 97-0024 RSWL(RCx)

Dear Mr. Goodroe:

Please find enclosed for lodging with the Court an original and one copy of the proposed ORDER in the above-captioned case. I am also enclosing one extra copy of the order which I would appreciate being date-stamped and returned to me in the self-addressed envelope provided.

Thank you very much for your assistance. Should you have any questions, please call me at (202) 514-3701.

Sincerely,

Assistant Attorney General
Environment and Natural
Resources Division

By:

Cherie L. Rogers, Attorney
Environmental Defense Section

Enclosures

cc: Counsel of Record

EXHIBIT C

4

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNOCAL CORPORATION, UNION OIL
COMPANY OF CALIFORNIA, and ERST,
INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE
NATIONAL POLLUTION FUNDS CENTER,
DANIEL SHEEHAN as the DIRECTOR OF
THE NATIONAL POLLUTION FUNDS
CENTER, THE SOUTHERN CALIFORNIA
REGIONAL RAIL AUTHORITY dba
METROLINK, KRUZE & KRUZE
CONSTRUCTION & ENGINEERING, INC.,
and ECCO EQUIPMENT CORPORATION,

Defendants.

Case No. 97-0024 RSWL(RCx)

ORDER

AND NOW, this ____ day of _____, 1997, upon
consideration of the United States' Motion to Dismiss Claim for
Monetary Relief and to Stay Proceeding with Regard to the United
States, and the Court being fully advised in the premises, it is
hereby ORDERED AND ADJUDGED that:

1. Pursuant to Fed. R. Civ. P. 12(b), the United States'
motion to dismiss Plaintiffs' claim seeking monetary relief
against the United States is granted on the grounds that there
has been no waiver of sovereign immunity under the Administrative
Procedure Act, 5 U.S.C. § 702, et seq., which would allow this
Court to award monetary damages, and therefore, subject matter

1 jurisdiction is lacking to award such relief as Plaintiffs have
2 prayed for; and

3 2. In the interest of judicial economy and for good cause
4 shown, the proceeding against the United States shall be held in
5 abeyance (including the filing of the administrative record)
6 until further order of this Court.

7 IT IS SO ORDERED.

8
9
10 Honorable Ronald S. W. Lew
United States District Judge
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18 Presented by:

19 Cherie L. Rogers
20 CHERIE L. ROGERS, Trial Attorney
United States Department of Justice
21 Environment and Natural Resources Div.
Environmental Defense Section
22 P.O. Box 23986
Washington, DC 20026-3986
23 Telephone No. (202) 514-3701
24 Attorney for DEFENDANT THE UNITED STATES
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the proposed ORDER has been sent by first class mail to the following counsel of record on May 21st, 1997:

WILLIAM H. COLLIER, JR.
JOSEPH A. WALSH II
JOHN M. WHELAN
Keesal, Young & Logan
400 Oceangate
Post Office Box 1730
Long Beach, CA 90801-1730
Telephone No. (310) 436-2000

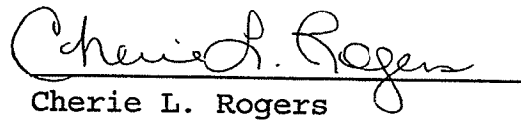
Attorneys for PLAINTIFFS UNOCAL
CORPORATION, UNION OIL COMPANY
OF CALIFORNIA and ERST, INC.

ALEX JOVANOVIICH
Wheatley, Scott, Osaki & Jovanovich
2600 E. Nutwood Avenue
Fullerton, CA 92831
Telephone No. (714) 992-6300

Attorney for DEFENDANTS KRUZE & KRUZE
ENGINEERING, INC. and ECCO EQUIPMENT
CORPORATION

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Attorneys for DEFENDANT SOUTHERN
CALIFORNIA REGIONAL RAIL AUTHORITY
dba METROLINK


Cherie L. Rogers

3877-12
P

1 LOIS J. SCHIFFER
Assistant Attorney General
2 Environment and Natural Resources Div.

3 NORA MANELLA
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4 Central District of California

5 MONICA MILLER
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6 Central District of California
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8 CHERIE L. ROGERS
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United States Department of Justice
9 Environment and Natural Resources Div.
Environmental Defense Section
10 P.O. Box 23986
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11 Telephone No. (202) 514-3701

12 Attorneys for DEFENDANT THE UNITED STATES

13
14 IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION

16 UNOCAL CORPORATION, UNION OIL
COMPANY OF CALIFORNIA, and ERST,
17 INC.,

18 Plaintiffs,

19 v.

20 THE UNITED STATES OF AMERICA, THE
NATIONAL POLLUTION FUNDS CENTER,
21 DANIEL SHEEHAN as the DIRECTOR OF
THE NATIONAL POLLUTION FUNDS
22 CENTER, THE SOUTHERN CALIFORNIA
REGIONAL RAIL AUTHORITY dba
23 METROLINK, KRUZE & KRUZE
CONSTRUCTION & ENGINEERING, INC.,
24 and ECCO EQUIPMENT CORPORATION,

25 Defendants.

) Case No. 97-0024 RSWL(RCx)

) UNITED STATES' REPLY
) MEMORANDUM IN SUPPORT OF
) MOTION TO DISMISS CLAIM
) FOR MONETARY RELIEF AND TO
) STAY PROCEEDING WITH REGARD
) TO THE UNITED STATES

) Date: May 19, 1997
) Time: 10:00 a.m.
) Courtroom: No. 21

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1 sovereign immunity for those suits seeking reimbursement of
2 removal costs under the OPA because such suits are in the form of
3 equitable relief. However, to the extent the International
4 Marine Carriers decision implies that a court can award monetary
5 relief under the APA, such a conclusion is incorrect. It is the
6 United States' position that the International Marine Carriers
7 case did not reach that issue and that the decision is
8 essentially dicta, as the court granted summary judgment in favor
9 of the United States on grounds that the NPFC did not act
10 arbitrarily, capriciously, or abuse its discretion in denying
11 plaintiff's claim. Consequently, the issue of the court actually
12 ordering monetary relief, vice remand to the NPFC for further
13 consideration, was not decided because it was therefore
14 unnecessary.

15 In the instant case, Unocal specifically requests the Court
16 to order the payment of money for removal costs incurred in
17 responding to an oil spill. While Unocal may characterize such
18 request as an equitable action for restitution, it is clearly a
19 request for monetary relief which is unavailable under the APA.
20 Restitution refers to restoring a party to its status quo prior
21 to the injury. The status quo prior to the NPFC decision
22 situated Unocal as a responsible party, attempting to establish a
23 defense to liability and entitlement to payment for removal costs
24 under the OPA. The NPFC determined that Unocal failed to
25 establish such a defense and therefore denied Unocal's claim for
26 removal costs. Because there has been no decision by the NPFC
27 that Unocal is entitled to payment of removal costs (or that the
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1 quantum of Unocal's removal costs are allowed under the OPA),
2 Unocal's only remedy is judicial review of the NPFC decision, not
3 the payment of money.^{1/}

4 The APA does not confer authority upon the federal courts to
5 order the payment of money to compensate those suffering a legal
6 wrong. Instead, the APA is intended to protect those injured by
7 agency action by allowing judicial review of an agency's
8 decision. Section 702 of the APA provides in pertinent part:

9 A person suffering legal wrong because of
10 agency action, or adversely affected or
11 aggrieved by agency action within the meaning
of a relevant statute, is entitled to judicial
review thereof.

12 5 U.S.C. § 702.

13 This Court has jurisdiction to review the final agency
14 decision of the NPFC pursuant to 5 U.S.C. §§ 702, 704. If this
15 Court were to find that the NPFC decision was arbitrary and
16 capricious, the Court has the authority to remand this matter to
17 the NPFC for further consideration. However, monetary relief may
18 not be awarded by the Court under the APA.

19 Additionally, it is firmly established that an agency of the
20 United States may not be sued eo nomine unless Congress

21
22 ^{1/} While it is well settled that a monetary award may be
23 equitable in nature where it results from a statutory mandate to
24 pay money, Bowen v. Massachusetts, 487 U.S. 879, 900 (1988), this
25 is not the case here. Unlike Unocal, the state in Bowen brought an
26 action for judicial review under the APA seeking declaratory and
27 injunctive relief, not a direct order for the payment of money. As
28 previously stated, Unocal is seeking an order requiring the Court
to award the payment of money when there has been no decision by
the NPFC that Unocal is entitled to payment under the OPA. This
Court is without authority to order such monetary relief.

1 specifically authorizes such suit. Blackmar v. Guerre, 342 U.S.
2 512, 515 (1925); Midwest Growers Co-op. v. Kirkemo, 533 F.2d 455,
3 465 (9th Cir. 1976); City of Whittier v. U.S. Dep't of Justice,
4 598 F.2d 561, 562 (9th Cir. 1979). Here, there is no explicit
5 language in the OPA which waives sovereign immunity for suits
6 against the Director of the NPFC and the NPFC itself.

7 Accordingly, because sovereign immunity has not been waived,
8 this Court lacks subject matter jurisdiction.

9 **II. THE UNITED STATES' REQUESTED STAY OF JUDICIAL REVIEW OF**
10 **THE NPFC DECISION IS CONSISTENT WITH THE OPA**

11 In its opposition, Unocal makes a plea to the Court to
12 review the merits of the NPFC decision before adjudicating
13 Unocal's claims against the private defendants. Unocal asserts
14 that this "will both serve the interests of judicial economy and
15 comply with the intent of Congress." Pls. Opp. at 6.

16 To the contrary, judicial review of the NPFC decision while
17 litigation between Unocal and the private defendants is pending
18 is clearly in direct conflict with the statutory provisions and
19 intent of the OPA.

20 The Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.,
21 imposes strict liability on responsible parties for removal costs
22 and damages resulting from the discharge of oil into navigable
23 waters of the United States. 33 U.S.C. § 2702(a). A responsible
24 party is defined as any owner or operator of a facility, which
25 includes any equipment or device used for exploring or drilling
26 for oil. 33 U.S.C. §§ 2701(9), 2701(32).

27 Under the OPA, a responsible party may avoid liability for
28

1 removal costs and damages if it can prove that the discharge of
2 oil into or upon navigable waters was the sole fault of a third
3 party, and that it exercised due care and took precautions to
4 guard against the foreseeable actions of a negligent third party.
5 33 U.S.C. § 2703(a)(3). Where a responsible party can establish
6 such a defense, it may submit a claim for compensation for such
7 removal costs and damages against the third party as the actual
8 responsible party or the Oil Spill Liability Trust Fund ("Fund").
9 33 U.S.C. §§ 2701(3), 2702(d)(1)(A), 2708, and 2713.

10 Thus, a "claimant may elect to commence an action in court
11 against the responsible party or guarantor or to present the
12 claim to the Fund." 33 U.S.C. § 2713(c) (emphasis added).
13 Logically, the statute apparently assumes that the election would
14 lead to one or the other, i.e., that, should a plaintiff
15 determine that a lawsuit is preferable given the facts and
16 potential recoverable damages, to a claim against the Fund, only
17 the lawsuit would be filed. That is not the case here, as Unocal
18 filed a claim against the Fund, and then subsequently elected to
19 file a lawsuit against the putative responsible parties.
20 Nevertheless, the law also recognizes that possibility, for the
21 OPA bars the payment of claims against the Fund where there is
22 "an action by the person in court to recover costs which are the
23 subject of the claim." 33 U.S.C. § 2713(b)(2); 33 C.F.R. §
24 136.103(d).

25 Unocal then cannot contend that this explicit limitation on
26 the NPFC's ability to approve or certify a claim while litigation
27 involving the same claim is pending is inconsistent with the
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1 intent of Congress, or that this frustrates Unocal's right to
2 recoup. As explained in our initial memorandum, the requested
3 stay in the instant case is predicated on this statutory
4 provision. Contrary to Unocal's assertions, the requested stay
5 is simply not an attempt to avoid the Court's review of the NPFC
6 decision, but is the result compelled by the statute. Unocal has
7 voluntarily elected to seek removal costs and damages, as well as
8 interest and attorney fees, from the potential responsible
9 parties. Because Unocal has made the election to litigate this
10 matter against potential responsible parties, payment of Unocal's
11 claim for removal costs is statutorily prohibited. Therefore,
12 the action against the United States becomes essentially "moot"
13 until the elected lawsuit is resolved.

14 As discussed in our initial memorandum, judicial economy is
15 served by first resolving the dispute between Unocal and the
16 private defendants. Resolution of that lawsuit may also readily
17 resolve any claim Unocal has against the United States. Even
18 were that not so, Unocal's purported interest in speedy
19 resolution of this case cannot overcome compliance with the
20 explicit statutory and regulatory provisions of the OPA.
21 Accordingly, the United States' motion to stay judicial review of
22 the NPFC decision should be granted.

23 CONCLUSION

24 For the reasons set forth above and in the United States'
25 initial memorandum, the United States respectfully requests that
26 this Court dismiss Unocal's Ninth Cause of Action to the extent
27 it seeks monetary relief against the United States, and stay this
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1 proceeding with regard to any remaining claims against the United
2 States.

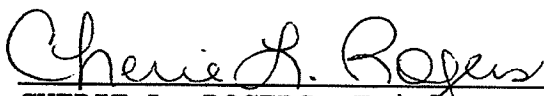
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7 NORA M. MANELLA
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13 DATE: May 8th, 1997


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CLAIM FOR MONETARY RELIEF AND TO STAY PROCEEDING WITH REGARD TO THE UNITED STATES has been sent by federal express mail to the following counsel of record on May 8th, 1997:

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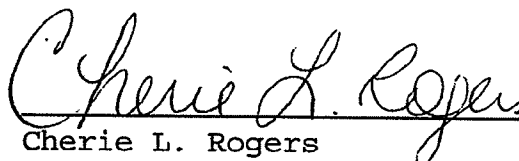
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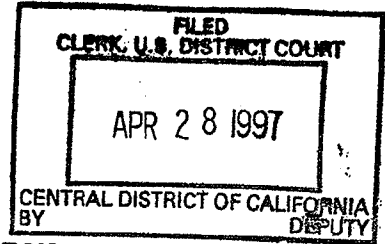
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7 UNION OIL COMPANY OF CALIFORNIA and
8 ERST, INC.

8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10

11 UNOCAL CORPORATION, UNION OIL)
12 COMPANY OF CALIFORNIA and ERST,)
13 INC.,)

13 Plaintiffs,)

14 vs.)

15 THE UNITED STATES OF AMERICA, THE)
16 NATIONAL POLLUTION FUNDS CENTER,)
17 DANIEL SHEEHAN as the DIRECTOR OF)
18 THE NATIONAL POLLUTION FUNDS)
19 CENTER, THE SOUTHERN CALIFORNIA)
20 REGIONAL RAIL AUTHORITY dba)
21 METROLINK, KRUZE & KRUZE)
22 CONSTRUCTION & ENGINEERING, INC.,)
23 ECCO EQUIPMENT CORPORATION,)

20 Defendants.)

No. CV-97-0024 RSWL (RCx)

PLAINTIFFS' OPPOSITION TO
UNITED STATES' MOTION TO
DISMISS CLAIM AND TO STAY
PROCEEDINGS

Date: May 12, 1997
Time: 9:00 a.m.
Courtroom: 21

22 UNOCAL CORPORATION, UNION OIL COMPANY OF CALIFORNIA
23 and ERST, INC. (hereinafter "Unocal") respectfully submit this
24 Memorandum of Law in opposition to the United States' motion to
25 dismiss and motion to stay.

26 ///

28 ///

I.

INTRODUCTION

With respect to the United States' motion to dismiss, Unocal respectfully requests that the Court deny the motion on the ground that the relief which Unocal seeks is equitable in nature. As such, Unocal's claim is not barred by the doctrine of sovereign immunity, despite the United States' arguments to the contrary. The United States has consented to such suits pursuant to the relevant provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (specifically § 702.)

With respect to the United States' motion to stay, Unocal submits that fairness and judicial economy can only be served by denying the United States' motion and reviewing the National Pollution Funds Center's decision in the context of a motion for summary judgment as soon as practical after the United States produces the administrative record on which the NPFC based its decision.

II.

LEGAL ARGUMENT

A. UNOCAL'S CLAIM AGAINST THE UNITED STATES SEEKING
EQUITABLE RELIEF IS NOT BARRED BY THE DOCTRINE OF
SOVEREIGN IMMUNITY.

Unocal has brought a claim against the United States under the Administrative Procedures Act, 33 U.S.C. § 551, *et seq.*, seeking judicial review of the National Pollution Funds Center's

1 ("NPFC") denial of Unocal's claim for reimbursement of removal
2 costs from the Federal Oil Spill Liability Trust Fund ("OSLTF").¹
3 The Administrative Procedures Act ("APA") provides, in pertinent
4 part, that an action seeking relief other than money damages
5 shall not be dismissed on the ground that the United States is a
6 defendant. 5 U.S.C. § 702. This provision of the APA acts as a
7 waiver of the United States' sovereign immunity for suits subject
8 to the section. Hill v. United States, 571 F.2d 1098, 1102 (9th
9 Cir. 1978); Aminoil USA, Inc. v. California State Water Resources
10 Control Board, 674 F.2d 1227 (9th Cir. 1982). Unocal seeks relief
11 other than direct money damages from the United States and,
12 therefore, the United States' sovereign immunity does not bar
13 Unocal's claim.

14 Notwithstanding the fact that Unocal seeks monetary
15 relief against the United States, the nature of the relief sought
16 is equitable, not legal. Unocal does not seek compensatory
17 damages from the United States for an injury which Unocal contends
18 to have suffered as a result of the NPFC's denial of its claim
19 for reimbursement. Rather, Unocal seeks to enforce the NPFC's
20 statutory mandate to pay money as reimbursement. It is well
21 settled that such relief is equitable in nature. Bowen v.
22 Massachusetts, 487 U.S. 879, 900 (1988).

23 Whether the United States' sovereign immunity bars a
24 suit brought under 33 U.S.C. § 702 depends not on whether the
25

26 ¹ The OSLTF was established in conjunction with the Oil
27 Pollution Act of 1990, 33 U.S.C. § 2701, et seq., to provide a
28 pool of money available for the President to pay, among other
things, claims for unreimbursed removal costs. See 33 U.S.C.
§ 2712.

1 relief sought is monetary or non-monetary but, rather, whether the
2 nature of the relief sought is in the form of restitution or other
3 equitable relief, on the one hand, and money damages, on the other
4 hand. Bowen, 487 U.S. at 901. Federal courts routinely award
5 monetary relief to plaintiffs bringing APA claims against the
6 United States whenever the relief sought is equitable in nature;
7 see DeVargas v. Mason & Hanger-Silas Mason Company, Inc., 911 F.2d
8 1377 (10th Cir. 1990), cert. denied, 498 U.S. 1074 (1991)
9 (plaintiff's suit to collect back pay held equitable in nature
10 and not barred by United States' sovereign immunity); National
11 Association of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988),
12 cert. denied, 488 U.S. 1005 (1989) (local government's suit for
13 release of trust fund monies not claimed for money damages within
14 meaning of APA).

15 At least one district court has already ruled that
16 reimbursement of OPA removal costs from the OSLTF constitutes
17 restitution, not damages. International Marine Carriers v. Oil
18 Spill Liability Trust Fund, 903 F. Supp. 1097, 1102 (S.D. Tex.
19 1994). Plaintiff IMC sought judicial review of the NPFC's denial
20 of IMC's claim for reimbursement of removal costs. As the United
21 States has done here, the United States moved to dismiss on the
22 ground that IMC's suit was barred by the doctrine of sovereign
23 immunity. The district court denied the United States' motion to
24 dismiss, ruling instead that the APA's waiver of sovereign immuni-
25 ty applied to IMC's suit since the monetary relief which IMC
26 sought was in the form of equitable relief. Id. at 1103. As the
27 United States is aware, no published decision contradicts Inter-
28 national Marine Carrier's classification of reimbursement of OPA

1 removal costs as equitable relief.

2 A close analogy to the type of relief sought by Unocal
3 is found in the cost recovery actions under Section 107 of the
4 Comprehensive Environmental Response, Compensation, and Liability
5 Act ("CERCLA"), 42 U.S.C. § 9607. The courts recognize CERCLA
6 recovery actions as equitable claims. See United States v.
7 Northeastern Pharmaceutical, 810 F.2d 726, 749 (8th Cir. 1986),
8 cert. denied, 484 U.S. 848 (1987); United States v. Northern Aire
9 Plating Company, 685 F. Supp. 1410, 1413 (W.D. Mich. 1988),
10 affirmed sub nom; United States v. R.W. Meyer, Inc., 889 F.2d 1497
11 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); GN Industries
12 of Michigan, Inc. v. Forstmann-Little, 800 F. Supp. 695, 698
13 (S.D. Ind. 1991).

14 Inasmuch as Unocal's action against the United States
15 seeks equitable relief, the APA's waiver of sovereign immunity
16 applies to Unocal's suit for judicial review. On this ground, the
17 United States' motion to dismiss should be denied.

18

19 B. LEGISLATIVE INTENT AND THE INTERESTS OF JUDICIAL
20 ECONOMY AND FUNDAMENTAL FAIRNESS WILL BE SERVED BY
21 DENYING THE UNITED STATES' MOTION TO STAY.

22 Unocal submitted a claim to the NPFC to recover removal
23 costs which it incurred as the result of an oil spill which
24 occurred in February 1995 when a Metrolink contractor struck and
25 punctured a Unocal oil pipeline.

26 Unocal contends that its claim to the NPFC, and the
27 evidence which Unocal submitted in support of its claim, clearly
28 demonstrated that Unocal was entitled to reimbursement from the

1 OSLTF. Unocal contends that the NPFC improperly denied its claim,
2 in that the NPFC failed to adequately investigate Unocal's claim
3 and the cause of the spill, failed to properly apply relevant
4 legal principles as required by the relevant statute and APA.
5 Moreover, the NPFC considered inaccurate and insufficient informa-
6 tion supplied by Metrolink's attorney which should not have been
7 considered, inasmuch as the information was not only inaccurate,
8 but it met no accepted evidentiary standard of credibility.

9 Unocal now seeks the Court's review of the NPFC's
10 decision pursuant to the Administrative Procedures Act. 33 U.S.C.
11 § 551 *et seq.* Unocal respectfully requests that the Court ad-
12 dress this claim first, before hearing Unocal's claims against
13 Metrolink, Kruze & Kruze Construction & Engineering, Inc. and Ecco
14 Equipment Corporation (the "private defendants"). Granting the
15 United States' motion to stay and adjudicating Unocal's claim
16 against the private defendants will reward the NPFC for its
17 failure to comply with its responsibility to properly consider
18 Unocal's claim. Such a ruling may encourage the NPFC to deny
19 similar claims in the future.

20 Addressing Unocal's claim against the United States
21 first will both serve the interests of judicial economy and comply
22 with the intent of Congress.

23

24 1. The OPA '90 Statutory Scheme.

25 Seeking to improve upon "a fragmented collection of
26 federal and state laws providing inadequate cleanup and damages
27 remedies" for oil spills, Congress passed the Oil Pollution Act of
28 1990 ("OPA"), 33 U.S.C. § 2701, *et seq.* See 1990 U.S. Code Cong.

1 & Admin. News 722, 723. Consistent with this goal, OPA estab-
2 lished procedures pursuant to which persons who had suffered
3 economic injury as the result of an oil spill could gain reim-
4 bursement for their losses from certain funds available in the Oil
5 Spill Liability Trust Fund ("OSLTF"). 33 U.S.C. § 2713.

6 OPA specifically provides access to the OSLTF to owners
7 of underground oil pipelines, so long as the pipeline owner
8 demonstrates to the NPFC, by a preponderance of the evidence,
9 that the discharge was caused by the acts or omissions of a third
10 party. See 33 U.S.C. §§ 2703, 2708, 2713. Congress did not
11 condition access to such relief on the amount claimed, the
12 claimant's wealth or its participation in the oil industry.

13 The legislative history of OPA casts significant light
14 on the purpose of the OSLTF and OPA's claims procedures:

15 The Fund is to provide compensation for
16 damage claims fully and promptly. While the
17 Fund must require some evidence of loss and
18 the establishment of a causal connection with
19 oil pollution, it should not routinely contest
20 or delay the settlement of damage claims. The
21 Fund will sometimes be providing compensation
22 where there is little chance of subrogation
23 against the discharger. Even so, litigation
24 or lengthy adjudicatory proceedings over lia-
25 bility, defenses, or the propriety of claims
26 should be reserved for subrogation actions
27 against dischargers.

28 1990 U.S. Code Cong. & Admin. News 722, 732 (emphasis added).

Clearly, Congress found that the navigable waters of the United States would be most effectively protected with a statutory scheme that provided prompt reimbursement of removal costs and other damages to parties who suffered damages from an oil spill, but were not responsible for the spill. Such a scheme encourages members of the oil and transportation industries to respond promptly to oil spills for the purpose of protecting the environment, even in cases where the oil industry member did not cause the spill, because the oil company can count on the prompt reimbursement of removal costs without resort to litigation, as OPA guarantees.

The United States' motion to stay asks the Court to force Unocal to litigate the underlying action against the parties allegedly responsible for the spill first, before the Court determines whether the NPFC properly administered Unocal's claim. This request, if granted, would completely turn the statutory scheme on its head. As Congress intended, the litigation of the underlying facts should be left for the United States to pursue in a subrogation action against the dischargers. Unocal, having submitted a valid claim to the NPFC, is entitled to prompt and full compensation from the OSLTF, without resort to litigation.

2. Staying the Court's Review of the NPFC's Decision Will Undermine Judicial Economy and Frustrate the Intent of Congress.

Judicial economy, fundamental fairness and the intent of Congress can only be served if this Court first reviews the NPFC's denial of Unocal's claim before the underlying facts are litigated

1 between Unocal and the private defendants. Congress intended that
2 the NPFC, not this Court, adjudicate Unocal's claim for removal
3 costs. Unocal contends that the administrative record clearly
4 supports its claim that the NPFC inadequately and improperly did
5 so.

6 This lawsuit can be most expeditiously resolved after
7 hearing Unocal's motion for summary judgment which Unocal intends
8 to file promptly following the United States' production of the
9 administrative record. If the Court grants Unocal's motion and
10 orders the NPFC to reimburse Unocal, Unocal's claims against the
11 private defendants need not be litigated at all. Furthermore,
12 since the administrative record cannot be supplemented with
13 discovery, the Court's early review of the NPFC's decision may
14 obviate the need for any discovery as between Unocal and the
15 private defendants.

16 The United States wants to delay the Court's review of
17 the NPFC decision with the hope that such a review will eventually
18 be unnecessary. While a delay may serve the interests of the
19 United States, it will not serve the interests of this Court,
20 Unocal or the private defendants. Only the United States' inter-
21 ests will be served by staying judicial review of the NPFC's
22 decision. This Court will be required to commit its scarce
23 resources to litigate claims that the Congress entrusted to the
24 NPFC to resolve. The private defendants will be forced to endure
25 the time and expense of preparing for trial. And Unocal will be
26 required to prosecute a lengthy, expensive trial to recover its
27 removal costs and other damages despite a statutory framework
28 adopted specifically to relieve claimants in Unocal's shoes from

1 being forced to travel such an arduous, expensive path.

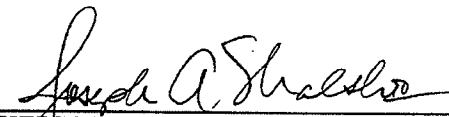
2
3 III.

4 CONCLUSION

5
6 For the foregoing reasons, Unocal respectfully requests
7 that the Court deny the United States' motion to dismiss and
8 motion to stay.

9
10 Respectfully submitted,

11
12 Dated: April 28, 1997


13 WILLIAM H. COLLIER, JR.
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18 CORPORATION, UNION OIL COMPANY OF
19 CALIFORNIA and ERST, INC.
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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Keesal, Young & Logan, 400 Oceangate, Long Beach, California 90802.

On April 28, 1997, I served the foregoing document described as OPPOSITION TO UNITED STATES' MOTION TO DISMISS CLAIM FOR MONETARY RELIEF AND TO STAY PROCEEDING WITH REGARD TO THE UNITED STATES on the parties in this action by placing a true copy thereof enclosed in a sealed envelopes addressed as indicated on the attached service list.

I deposited such envelope(s) in the mail at Long Beach, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in this declaration.

Executed on April 28, 1997, at Long Beach, California.

Pursuant to the Local Rules of the United States District Court, I certify that all originals and service copies (including exhibits) of the papers referred to herein were produced and reproduced on paper purchased as recycled, as defined by Section 42202 of the Public Resources Code.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


JANICE JACO

(JAJ\FORM\403776)

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PROOF OF SERVICE BY TELECOPIER

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Keesal, Young & Logan, 400 Oceangate, Long Beach, California 90802.

On April 28, 1997, I served the foregoing document described as OPPOSITION TO UNITED STATES' MOTION TO DISMISS CLAIM FOR MONETARY RELIEF AND TO STAY PROCEEDING WITH REGARD TO THE UNITED STATES on the parties in this action by faxing a true copy thereof as follows:

Cherie Rogers, Esq.
U.S. Department of Justice
Environment and Natural
Resources Division
Environmental Defense
Section
P.O. Box 23986
Washington, D.C. 20026-3986
Fax: 202.514.2584

Executed on April 28, 1997, at Long Beach, California.

Pursuant to the Local Rules of the United States District Court, I certify that all originals and service copies (including exhibits) of the papers referred to herein were produced and reproduced on paper purchased as recycled, as defined by Section 42202 of the Public Resources Code.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



JANICE JACO

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Keesal, Young & Logan, 400 Oceangate, Long Beach, California 90802.

On April 28, 1997, I personally served the foregoing document described as OPPOSITION TO UNITED STATES' MOTION TO DISMISS CLAIM FOR MONETARY RELIEF AND TO STAY PROCEEDING WITH REGARD TO THE UNITED STATES on the parties in this action as follows:

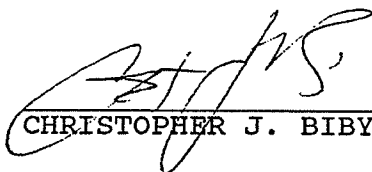
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FROM: John M. Whelan

TELECOPIER NO.: (562) 436-7416 or (562) 590-8332

RE: Unocal v. The United States

OUR FILE NO.: 3877-12

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U.S. Department of Justice

Environment and Natural Resources Division

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Environmental Defense Section

Washington, DC 20026-3986

April 18, 1997

VIA FEDERAL EXPRESS MAIL

Frank E. Goodroe, Clerk
United States District Court
Central District of California
U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

RE: Unocal Corp., et al. v. United States, et al.,
Case No. 97-0024 RSWL(RCx)

Dear Mr. Goodroe:

Please find enclosed for filing in the above-captioned case an original and one copy of the UNITED STATES' NOTICE, MOTION, AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CLAIM FOR MONETARY RELIEF AND TO STAY PROCEEDING WITH REGARD TO THE UNITED STATES. I am also enclosing one extra copy of the notice, motion, and memorandum which I would appreciate being file-stamped and returned to me in the self-addressed envelope provided.

Thank you very much for your assistance. Should you have any questions, please call me at (202) 514-3701.

Sincerely,

Assistant Attorney General
Environment and Natural
Resources Division

By:

Cherie L. Rogers

Cherie L. Rogers, Attorney
Environmental Defense Section

Enclosures

cc: Counsel of Record

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14

IN THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

16

17 UNOCAL CORPORATION, UNION OIL)
 COMPANY OF CALIFORNIA, and ERST,)
 18 INC.,)

19 Plaintiffs,)

20 v.)

Case No. 97-0024 RSWL(RCx)

21 THE UNITED STATES OF AMERICA, THE)
 NATIONAL POLLUTION FUNDS CENTER,)
 22 DANIEL SHEEHAN as the DIRECTOR OF)
 THE NATIONAL POLLUTION FUNDS)
 23 CENTER, THE SOUTHERN CALIFORNIA)
 REGIONAL RAIL AUTHORITY dba)
 24 METROLINK, KRUZE & KRUZE)
 CONSTRUCTION & ENGINEERING, INC.,)
 25 and ECCO EQUIPMENT CORPORATION,)

UNITED STATES' NOTICE
 OF MOTION, AND MOTION
 TO DISMISS CLAIM FOR
 MONETARY RELIEF AND TO
 STAY PROCEEDING WITH
 REGARD TO THE UNITED STATES

Date: May 12, 1997

Time: 9:00 a.m.

Courtroom: No. 21

26 Defendants.)

27

28

NOTICE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 12, 1997 at 9:00 a.m., or as soon thereafter as the matter can be heard, in the Courtroom of the Honorable Ronald S.W. Lew, Defendants the United States, the National Pollution Funds Center, and Daniel Sheehan, Director of the National Pollution Funds Center (hereinafter referred to as the "United States") will move (i) for dismissal of Plaintiffs' Ninth Cause of Action to the extent Plaintiffs seek a monetary award against the United States; and (ii) for a stay of this proceeding with regard to the United States.

MOTION

The United States hereby moves this Court for an order dismissing Plaintiffs' Ninth Cause of Action to the extent Plaintiffs seek a monetary award against the United States, and staying this proceeding with regard to the United States. In support of this motion, the United States relies on the arguments and authorities presented in the accompanying memorandum.

Respectfully submitted,

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Assistant Attorney General
Environment and Natural Resources Div.

NORA M. MANELLA
United States Attorney
Central District of California

MONICA MILLER
Assistant United States Attorney
Central District of California

1 DATE: April 18th, 1997

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 14 IN THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 15 WESTERN DIVISION

16 UNOCAL CORPORATION, UNION OIL
 COMPANY OF CALIFORNIA, and ERST,
 17 INC.,

18 Plaintiffs,

19 v.

20 THE UNITED STATES OF AMERICA, THE
 NATIONAL POLLUTION FUNDS CENTER,
 21 DANIEL SHEEHAN as the DIRECTOR OF
 THE NATIONAL POLLUTION FUNDS
 22 CENTER, THE SOUTHERN CALIFORNIA
 REGIONAL RAIL AUTHORITY dba
 23 METROLINK, KRUZE & KRUZE
 CONSTRUCTION & ENGINEERING, INC.,
 24 and ECCO EQUIPMENT CORPORATION,

25 Defendants.

) Case No. 97-0024 RSWL(RCx)

) UNITED STATES' MEMORANDUM
) IN SUPPORT OF MOTION
) TO DISMISS CLAIM FOR
) MONETARY RELIEF AND TO
) STAY PROCEEDING WITH REGARD
) TO THE UNITED STATES

) Date: May 12, 1997
) Time: 9:00 a.m.
) Courtroom: No. 21

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 27
 28

INTRODUCTION

The United States, the National Pollution Funds Center, and Daniel Sheehan, Director of the National Pollution Funds Center (hereinafter referred to jointly as the "United States") respectfully submit this memorandum of law in support of their motion to dismiss Plaintiffs' claim for monetary relief and to stay this proceeding with regard to the United States.

Plaintiffs Unocal Corporation, Union Oil Company of California, and ERST, Inc. ("Unocal") allege that they have incurred \$4,657,542.40 in removal costs in responding to an oil spill caused solely by the acts or omissions of a third party, who is not an employee or agent of Unocal. Compl. ¶¶ 15, 54. Unocal filed this action seeking cost recovery from three private defendants. However, in the Ninth Cause of Action, Unocal seeks to recover these same costs from the United States via a claim under the Administrative Procedure Act ("APA"). Specifically, Unocal challenges the decision of the Coast Guard's National Pollution Funds Center ("NPFC") denying Unocal's claim for removal costs under the Oil Pollution Act of 1990 ("OPA"), and asks this Court to order the United States to reimburse Unocal for all removal costs it has incurred in responding to the oil spill. Compl. ¶¶ 1, 57.

As set forth below, however, this Court does not have subject matter jurisdiction over Unocal's claim for monetary relief. The APA does not provide a waiver of sovereign immunity for monetary actions against the United States. Thus, Unocal's claim for monetary relief must be dismissed.

1 The United States also asks that this proceeding be stayed
2 as to the United States because Unocal is now seeking to recover
3 its costs from the other private defendants. Until the claims
4 between Unocal and the other private defendants are resolved, it
5 is unnecessary for the Court to consider Unocal's challenge to
6 the NPFC decision.

7 STATEMENT OF FACTS

8 On or about February 20, 1995, a Caterpillar 983 track
9 loader being utilized by Defendants Southern California Regional
10 Rail Authority dba Metrolink ("Metrolink"), Kruze & Kruze
11 Construction & Engineering, Inc. ("Kruze & Kruze"), and Ecco
12 Equipment Corporation ("Ecco"), struck and ruptured Unocal's
13 pipeline causing an oil spill. Compl. ¶ 12. The oil passed
14 through an adjacent storm drain system and into the San Gabriel
15 River, which is a navigable waterway of the United States.
16 Compl. ¶ 13.

17 Unocal responded to the spill and immediately began to clean
18 up and remove the spilled oil, incurring \$4,657,542.40 in removal
19 costs. Compl. ¶¶ 14, 15. On September 15, 1995, Unocal
20 submitted a claim to Metrolink for reimbursement of removal costs
21 incurred in responding to the oil spill. However, Metrolink
22 denied the claim. Compl. ¶ 17.

23 As owner of the pipeline, Unocal then submitted a claim to
24 the NPFC on March 8, 1996 seeking reimbursement of the removal
25 costs it incurred, asserting that it had a defense to liability
26 under the OPA, 33 U.S.C. § 2703, in that the discharge of oil and
27 resulting removal costs were caused solely by the act of a third
28

1 party. Compl. ¶¶ 18, 56.

2 The NPFC denied Unocal's claim on June 12, 1996.
3 Subsequently, on August 7, 1996, Unocal submitted a written
4 request for reconsideration of the denial, supplemented with
5 additional information. Compl. ¶¶ 19, 20. The NPFC denied
6 Unocal's request on October 9, 1996. Compl. ¶ 21. On January 2,
7 1997, Unocal filed this action against the operators of the
8 Caterpillar 983 track loader and against the United States.

9 **STATUTORY BACKGROUND**

10 The Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.,
11 established a new oil pollution liability and compensation
12 regime. The owner of a pipeline, such as Unocal, from which oil
13 is discharged is a responsible party and is strictly liable for
14 removal costs and damages. 33 U.S.C. §§ 2701(32), 2702. A
15 responsible party may avoid liability under the OPA if that party
16 can prove that the discharge of oil was the sole fault of a third
17 party who is not an employee or agent of the responsible party.
18 33 U.S.C. § 2703(a)(3). Where a responsible party can establish
19 such a defense, such party may submit a claim for removal costs
20 against the Oil Spill Liability Trust Fund ("Fund"). 33 U.S.C.
21 §§ 2708, 2713. However, the OPA prohibits the approval of any
22 claim against the Fund while litigation involving that same claim
23 is pending in court. 33 U.S.C. § 2713(b)(2).

24 **STANDARD OF REVIEW**

25 In evaluating a motion to dismiss under the Fed. R. Civ. P.
26 12(b), a court must generally consider the factual allegations in
27 the complaint as true. Buckey v. County of Los Angeles, 968 F.2d
28

1 791, 794 (9th Cir. 1992); see also Parks Sch. of Business, Inc.
2 v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, in a
3 Rule 12(b)(1) motion, plaintiffs bear the burden of establishing
4 that the allegations as pled give rise to subject matter
5 jurisdiction. Thornhill Publ'g Co. v. General Tel. & Elec.
6 Corp., 594 F.2d 730, 733 (9th Cir. 1979).

7 ARGUMENT

8 I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS'
9 CLAIM FOR MONETARY RELIEF

10 A. The Administrative Procedure Act Does Not Provide
11 A Jurisdictional Basis For Unocal's Monetary Claim
12 Against The United States.

13 The United States, as sovereign, is immune from suit except
14 insofar as it waives that immunity and consents to be sued, "and
15 the terms of its consent to be sued in any court define that
16 court's jurisdiction to entertain the suit." United States v.
17 Sherwood, 312 U.S. 584, 586 (1941); United States v. Mitchell,
18 445 U.S. 535, 538 (1980). The United States' consent to be sued
19 is "not lightly inferred." Hillier v. Southern Towing Co., 714
20 F.2d 714, 723 (7th Cir. 1983). Any waiver by the United States
21 of its sovereign immunity is subject to whatever constitutional
22 condition and limitations Congress wishes to impose. Deakyne v.
23 Department of Army Corps of Eng'rs, 701 F.2d 271, 274 n.4 (3d
24 Cir. 1983). Strict compliance with statutes waiving sovereign
25 immunity is required. Id., see also United States v. Sherwood,
26 312 U.S. at 590. If a plaintiff, in suing the United States,
27 fails to strictly comply with congressionally mandated conditions
28 for applying a waiver of sovereign immunity, the federal courts

1 have no subject matter jurisdiction to entertain such a lawsuit.
2 United States v. Testan, 424 U.S. 392, 399 (1976); United States
3 v. King, 395 U.S. 1, 4 (1969); McCarty v. United States, 929 F.2d
4 1085, 1087 (5th Cir. 1991); Amella v. United States, 732 F.2d
5 711, 713 (9th Cir. 1984). A waiver of sovereign immunity "cannot
6 be implied but must be unequivocally expressed." United States
7 v. King, 395 U.S. at 4; United States v. Mitchell, 445 U.S. at
8 538. Federal courts, which derive their authority to hear and
9 adjudicate claims from Congress, Neirbo Co. v. Bethlehem
10 Shipbuilding Corp., 308 U.S. 165, 167 (1939), are powerless to
11 entertain cases not within their subject matter jurisdiction.
12 Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1157 (5th
13 Cir. Unit B Mar. 1981).

14 Unocal's only claim against the United States in this matter
15 (i.e., the Ninth Cause of Action) is based on the APA. Compl. at
16 16. Section 704 of the APA provides for judicial review of
17 "final agency action." However, to the extent Unocal seeks
18 monetary damages against the United States, this Court lacks
19 subject matter jurisdiction to hear Unocal's claim because the
20 United States has not waived its sovereign immunity under the
21 APA.^{1/}

22 Although section 702 of the APA does provide a waiver of
23

24 ^{1/} Likewise, the OPA does not provide a waiver of sovereign
25 immunity. Nowhere in the OPA has Congress expressly provided for
26 a cause of action to be maintained against the Director of the NPFC
27 or the NPFC itself. Consequently, because there is no unequivocal,
28 express language waiving sovereign immunity against the Director or
the NPFC, this Court cannot imply such a right to sue.

1 sovereign immunity for certain non-monetary suits brought against
2 the United States, 5 U.S.C. § 702, the APA does not waive
3 sovereign immunity for monetary suits. Bowen v. Massachusetts,
4 487 U.S. 879 (1988); Aquino v. Stone, 768 F. Supp. 529, 532 (E.D.
5 Va. 1991), aff'd 957 F.2d 139 (4th Cir. 1992); Scanwell
6 Laboratories, Inc. v. Thomas, 521 F.2d 941, 948 (D.C. Cir.
7 1975).^{2/} Thus, since there has been no waiver of sovereign
8 immunity, this Court lacks subject matter jurisdiction over
9 Unocal's monetary claim against the United States.

10 **II. THIS PROCEEDING SHOULD BE STAYED WITH REGARD TO THE**
11 **UNITED STATES UNTIL UNOCAL'S CLAIMS AGAINST THE REMAINING**
12 **DEFENDANTS HAVE BEEN RESOLVED**

13 The APA does provide a basis for Unocal's challenge to the
14 NPFC decision on the ground that the decision was "arbitrary,
15 capricious, an abuse of discretion, or otherwise not in
16 accordance with law." 5 U.S.C. § 706(2)(A). However, the Court
17 should stay all proceedings with regard to the merits of the NPFC
18 decision because Unocal may recover its costs from the other
19 private defendants, making it unnecessary for the Court to even
20 consider the claim against the United States.

21 In this same action, Unocal has also sued Metrolink, Kruze &
22 Kruze, and Ecco for the same removal costs as those claimed by
23 Unocal against the United States. Unocal, as the responsible

24 ^{2/} See International Marine Carriers v. The Oil Spill Liab. Trust
25 Fund, 903 F. Supp. 1097, 1101-03 (S.D. Tex. 1994) (where the court
26 found that the NPFC decision was reviewable under the APA, 5 U.S.C.
27 § 704, and held that the proper standard of review is the
28 "arbitrary and capricious" standard mandated by 5 U.S.C. § 706).

1 party under the OPA, alleges, as a defense to its strict
2 liability, that the discharge of oil and the resulting damages
3 were caused solely by the acts or omissions of Metrolink, Kruze &
4 Kruze, and Ecco. Accordingly, Unocal seeks recovery from these
5 defendants for removal costs it incurred and will incur in
6 responding to the oil spill.

7 Ultimately, the liability among Unocal, Metrolink, Kruze &
8 Kruze, and Ecco should be the primary focus of this Court's
9 attention. If Unocal is successful in its claims against
10 Metrolink, Kruze & Kruze, and ECCO, Unocal's challenge to the
11 decision of the NPFC will be moot. On the other hand, if this
12 Court finds that the discharge was not the sole fault of
13 Metrolink, Kruze & Kruze, and/or ECCO, Unocal's claim against the
14 United States will be moot in the absence of a sole fault third-
15 party defense to its strict liability. 33 U.S.C. § 2703(a)(3).

16 A stay of the claim against the United States would be
17 consistent with the provisions of the OPA. Section 2713(b)(2) of
18 the OPA provides that "[n]o claim of a person against the Fund
19 may be approved or certified during the pendency of an action by
20 the person in court to recover costs which are the subject of the
21 claim." 33 U.S.C. § 2713(b)(2).

22 In sum, all roads lead to the necessity of resolving the
23 liability between Unocal and the other private defendants before
24 resolution of Unocal's claim against the United States.

25 It is well established that "the power to stay proceedings
26 is incidental to the power inherent in every court to control the
27 disposition of the causes on its docket with economy of time and
28

1 effort for itself, for counsel, and for litigants." Landis v.
2 North American Co., 299 U.S. 248, 254 (1936); see also
3 Mediterranean Enter., Inc. v. Ssangyong Corp., 708 F.2d. 1458,
4 1465 (9th Cir. 1983). In the instant case, judicial review of
5 the administrative record is premature and would clearly be a
6 waste of judicial resources at this time. Therefore, in the
7 interest of judicial economy, the United States respectfully
8 requests that Unocal's claim against the United States be stayed
9 until the claims against Metrolink, Kruze & Kruze, and Ecco are
10 fully resolved.

11 CONCLUSION

12 For the reasons set forth above, the United States
13 respectfully requests that this Court dismiss Unocal's Ninth
14 Cause of Action to the extent it seeks monetary relief against
15 the United States, and stay this proceeding with regard to any
16 remaining claims against the United States.

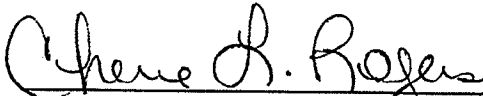
17 Respectfully submitted,

18 LOIS J. SCHIFFER
19 Assistant Attorney General
Environment and Natural Resources Div.

20 NORA M. MANELLA
21 United States Attorney
Central District of California

22 MONICA MILLER
23 Assistant United States Attorney
Central District of California

24
25 DATE: April 18th, 1997

26 
27 CHERIE L. ROGERS, Trial Attorney
United States Department of Justice
Environment and Natural Resources Div.
Environmental Defense Section
28

1 OF COUNSEL:

2 DEREK A. CAPIZZI, Attorney
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7 Telephone No. (703) 235-4791

8 JAMES K. AUGUSTINE, Attorney
9 United States Coast Guard
10 Office of Claims and Litigation
11 2100 Second Street, S.W.
12 Washington, DC 20593
13 Telephone No. (202) 267-2245

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the UNITED STATES' NOTICE, MOTION, AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CLAIM FOR MONETARY RELIEF AND TO STAY PROCEEDING WITH REGARD TO THE UNITED STATES has been sent by federal express mail to the following counsel of record on April 18th, 1997:

WILLIAM H. COLLIER, JR.
JOSEPH A. WALSH II
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Keesal, Young & Logan
400 Oceangate
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Attorney for DEFENDANTS KRUZE & KRUZE
ENGINEERING, INC. and ECCO EQUIPMENT
CORPORATION

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Telephone No. (310) 470-6110

Attorneys for DEFENDANT SOUTHERN
CALIFORNIA REGIONAL RAIL AUTHORITY
dba MERTOLINK


Cherie L. Rogers

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNOCAL CORPORATION, UNION OIL COMPANY
OF CALIFORNIA AND ERST, INC.

PLAINTIFF(S)

CASE NUMBER

CV- 97 - 0024 RSWL (RCx)

VS.

THE UNITED STATES OF AMERICA, THE
NATIONAL POLLUTION FUNDS CENTER,
DANIEL SHEEHAN as the DIRECTOR OF
THE NATIONAL POLLUTION FUNDS CENTER,
THE SOUTHERN CALIFORNIA REGIONAL
RAIL AUTHORITY dba MEROLINK, KRUIZE &
ECCO EQUIPMENT CORPORATION

S U M M O N S

Non-Federal Defendants

KRUIZE CONSTRUCTION & ENGINEERING, INC.,
TO THE ABOVE NAMED DEFENDANT(S), You are hereby summoned and required to
file with this court and serve upon
UNOCAL CORPORATION, UNION OIL COMPANY OF CALIFORNIA and ERST, INC.

Plaintiff's attorney, whose address is:

WILLIAM H. COLLIER, JR./JOSEPH A. WALSH II/JOHN M. WHELAN
KEESAL, YOUNG & LOGAN
400 Oceangate
P.O. Box 1730
Long Beach, CA 90801-1730

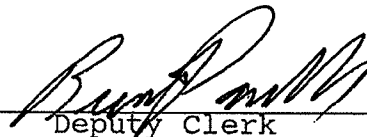
an answer to the complaint which is herewith served upon you
within 20 days after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment by default
will be taken against you for the relief demanded in the complaint.

DATE:

1/2/97

CLERK, U.S. DISTRICT COURT

By


Deputy Clerk

(SEAL OF THE COURT)

S U M M O N S

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNOCAL CORPORATION, UNION OIL COMPANY
OF CALIFORNIA AND ERST, INC.

PLAINTIFF(S)

CASE NUMBER

CV- 97 - 0024 RSWL (RCx)

VS.

THE UNITED STATES OF AMERICA, THE
NATIONAL POLLUTION FUNDS CENTER,
DANIEL SHEEHAN as the DIRECTOR OF
THE NATIONAL POLLUTION FUNDS CENTER,
THE SOUTHERN CALIFORNIA REGIONAL
RAIL AUTHORITY dba MEROLINK, KRUZE &
KRUZE CONSTRUCTION & ENGINEERING, INC.,
ECCO EQUIPMENT CORPORATION

S U M M O N S
Federal Defendants

TO THE ABOVE-NAMED DEFENDANT(S), You are hereby summoned and required to
file with this court and serve upon
UNOCAL CORPORATION, UNION OIL COMPANY OF CALIFORNIA and ERST, INC.

Plaintiff's attorney, whose address is:

WILLIAM H. COLLIER, JR./JOSEPH A. WALSH II/JOHN M. WHELAN
KEESAL, YOUNG & LOGAN
400 Oceangate
P.O. Box 1730
Long Beach, CA 90801-1730

an answer to the complaint which is herewith served upon you
within 60 days after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment by default
will be taken against you for the relief demanded in the complaint.

DATE: 1/2/97

CLERK, U.S. DISTRICT COURT

By

Brent Paul
Deputy Clerk

(SEAL OF THE COURT)

S U M M O N S

ORIGINAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE

Pursuant to the Local Rules Governing Duties of Magistrate Judges, the following Magistrate Judge has been designated to hear discovery motions for this case at the discretion of the assigned District Judge:

- | | |
|--------------------------------------------------------------|------------------------------------------------------|
| <input type="checkbox"/> Robert N. Block (RNBx) | <input type="checkbox"/> Arthur Nakazato (ANx) |
| <input checked="" type="checkbox"/> Rosalyn M. Chapman (RCx) | <input type="checkbox"/> Virginia A. Phillips (VAPx) |
| <input type="checkbox"/> Elgin Edwards (EEx) | <input type="checkbox"/> Brian Q. Robbins (BQRx) |
| <input type="checkbox"/> Charles F. Eick (Ex) | <input type="checkbox"/> Carolyn Turchin (CTx) |
| <input type="checkbox"/> R.J. Groh, Jr. (JGx) | <input type="checkbox"/> Andrew J. Wistrich (AJWx) |
| <input type="checkbox"/> Stephen J. Hillman (SHx) | <input type="checkbox"/> Carla M. Woehrle (CWx) |
| <input type="checkbox"/> James W. McMahon (Mcx) | |

Upon the filing of a discovery motion, the motion will be presented to the United States District Judge for consideration and may thereafter be referred to the Magistrate Judge for hearing and determination.

The Magistrate Judge's initials should be used on all documents filed with the Court so that the case number reads as follows:

97 - 0024 RSWL

CV-_____

NOTE: A COPY OF THIS NOTICE MUST BE SERVED WITH THE
COMPLAINT ON ALL DEFENDANTS.

NOTICE TO COUNSEL

THE COURT HAS DIRECTED THAT THE FOLLOWING RULES BE SPECIFICALLY CALLED TO YOUR ATTENTION.

- I. Continuing Obligation to Report Related Cases (Local Rule 4)
- II. Service of Papers and Process (Local Rule 5)
- III. Notice of Right to Consent to disposition of a Civil Case by a United States Magistrate Judge [28 U.S.C. §636 (c) and General Order 194-G].

I. CONTINUING OBLIGATION TO REPORT RELATED CASES

Parties are under the continuing obligation to promptly advise the Court whenever one or more civil actions or proceedings previously commenced and one or more currently filed appear to be related.

Local Rule 4.3.3 provides: "It shall be the continuing duty of the attorney in any case promptly to bring to the attention of the Court, by the filing of a Notice of Related Case(s) pursuant to Local Rule 4.3.1, all facts which in the opinion of the attorney or party appear relevant to a determination whether such action and one or more pending actions should, under the criteria and procedures set forth in Local Rule 4.3, be heard by the same judge."

Local Rule 4.2.1. provides: "It is not permissible to dismiss and thereafter refile an action for the purpose of obtaining a different judge." Whenever an action is dismissed before judgment and thereafter the same or essentially the same action is refiled, the latter action shall be assigned to the judge to whom the first action was assigned. It shall be the continuing duty of every attorney or party appearing in such a refiled action promptly to bring the prior action to the attention of the Clerk in writing by so noting on the civil cover sheet or by filing a separate notice of related case.

II. SERVICE OF PAPERS AND PROCESS

Local Rule 5.4 provides: "Except as otherwise provided by order of Court, or when required by the treaties or statutes of the United States, process shall not be presented to a United States Marshal for Service." Service of process must be accomplished in accordance with Rule 4 of the Federal Rules of Civil Procedure or in any manner provided by State Law, when applicable. Service upon the United States, an officer or agency thereof, shall be served pursuant to the provisions of FRCP 4 (i). Service should be promptly made; unreasonable delay may result in dismissal of the action under Local Rule 12 and Rule 4(m) of the Federal Rules of Civil Procedure. Proof of service or a waiver of service of summons and complaint must be filed with the court.

JS 44
(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, as required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

UNOCAL CORPORATION, UNION OIL COMPANY
OF CALIFORNIA and ERST, INC.

DEFENDANTS

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Delaware
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Svrein.Nation
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

WILLIAM H. COLLIER, JR./JOSEPH A.
WALSH II/JOHN M. WHELAN
KEESAL, YOUNG & LOGAN
400 Oceangate, Long Beach, CA 90802

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
☒ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN X IN ONE BOX
FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | | |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|---------------------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in this State | <input checked="" type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. ORIGIN

(PLACE AN X IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (Specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

V. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☒ NO

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.) Negligence; indemnity; apportionment of fault; indebitatus assumpsit; quantum meruit; breach of oral contract; recovery of oil spill removal costs (33 USC 2702); dec. relief; jud. review (5 USC 702)

VII. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL PROPERTY <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input checked="" type="checkbox"/> 890 Other Statutory Action

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

January 2, 1997

JOSEPH A. WALSH II

UNITED STATES DISTRICT COURT
CV-71 (07/92)

(CONTINUED ON REVERSE SIDE)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Fed defendants

3/8/97

Non-Fed defs

1/27/97

10,268,326

COMPANY

CASE NUMBER

CV- 97 - 0024 RSWL (RCx)

THE
ER,
R OF
CENTER
NAL
KRUZE &
ING, INC.,

S U M M O N S
Federal Defendants

S), You are hereby summoned and required to
e upon
COMPANY OF CALIFORNIA and ERST, INC.

Plaintiff's attorney, whose address is:
WILLIAM H. COLLIER, JR./JOSEPH A. WALSH II/JOHN M. WHELAN
KEESAL, YOUNG & LOGAN
400 Oceangate
P.O. Box 1730
Long Beach, CA 90801-1730

an answer to the complaint which is herewith served upon you
within 60 days after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment by default
will be taken against you for the relief demanded in the complaint.

DATE:

1/2/97

CLERK, U.S. DISTRICT COURT

By

DEBENT PACILLAS

(SEAL OF THE COURT)

S U M M O N S

ORIGINAL

SAP PLD \39846

P 3877-12

1 WILLIAM H. COLLIER, JR. (Bar No. 97491)
 2 JOSEPH A. WALSH II (Bar No. 143694)
 3 JOHN M. WHELAN (Bar No. 174928)
 4 KEESAL, YOUNG & LOGAN
 5 A Professional Corporation
 6 400 Oceangate
 7 Post Office Box 1730
 8 Long Beach, California 90801-1730
 9 Telephone: (310) 436-2000

10 ELLEN A. WHELAN (Bar No. 135279)
 11 Assistant Counsel/Legal Affairs
 12 CALIFORNIA OPERATING SERVICES,
 13 UNOCAL CORPORATION
 14 Hartley Center
 15 376 South Valencia Avenue
 16 Brea, California 92621
 17 Telephone: (714) 577-2030
 18
 19 Attorneys for UNOCAL CORPORATION,
 20 UNION OIL COMPANY OF CALIFORNIA and
 21 ERST, INC.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

16
 17 UNOCAL CORPORATION, UNION OIL)
 18 COMPANY OF CALIFORNIA and ERST,)
 19 INC.,)
 20 Plaintiffs,)
 21 vs.)
 22 THE UNITED STATES OF AMERICA, THE)
 23 NATIONAL POLLUTION FUNDS CENTER,)
 24 DANIEL SHEEHAN as the DIRECTOR OF)
 25 THE NATIONAL POLLUTION FUNDS)
 26 CENTER, THE SOUTHERN CALIFORNIA)
 27 REGIONAL RAIL AUTHORITY dba)
 28 METROLINK, KRUZE & KRUZE)
 CONSTRUCTION & ENGINEERING, INC.,)
 ECCO EQUIPMENT CORPORATION,)
 Defendants.)

97 - 0024 RSWL(RCx)

No. _____

COMPLAINT FOR NEGLIGENCE;
 INDEMNITY; APPORTIONMENT
 OF FAULT; INDEBITATUS
 ASSUMPSIT; QUANTUM
 MERUIT; BREACH OF ORAL
 CONTRACT; RECOVERY OF OIL
 SPILL REMOVAL COSTS (33
 U.S.C. § 2702);
 DECLARATORY RELIEF;
 JUDICIAL REVIEW OF FINAL
 AGENCY ACTION (5 U.S.C.
 § 702)

UNOCAL CORPORATION and UNION OIL COMPANY OF CALIFORNIA (hereinafter collectively "Unocal") and ERST, INC. (collectively "Unocal/ERST, Inc."), the Plaintiffs herein, file this original complaint, complaining of the UNITED STATES OF AMERICA, THE NATIONAL POLLUTION FUNDS CENTER, DANIEL SHEEHAN as the Director of the NATIONAL POLLUTION FUNDS CENTER, the SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY dba METROLINK, KRUZE & KRUZE CONSTRUCTION ENGINEERING, INC., and ECCO EQUIPMENT CORPORATION, for the causes of action herein alleged:

1. This action arises under the Administrative Procedure Act, 5 U.S.C. § 702, the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et. seq., and the law of the state of California. The jurisdiction of this court is founded on 28 U.S.C. § 1331 and 33 U.S.C. § 2717. This court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(a), over the state law claims herein alleged inasmuch as the state law claims form part of the same case or controversy and arise from the same operative facts from which the federal claims arise.

2. The United States District Court for the Central District of California is the proper venue for this action pursuant to 33 U.S.C. § 2717(b), in that the discharge of oil which is the subject of this action occurred in the city of Norwalk, California, which lies within this judicial district.

3. Plaintiff UNOCAL CORPORATION is a Delaware corporation with its principal place of business in Los Angeles County. Plaintiff UNION OIL CORPORATION OF CALIFORNIA is a California corporation with its principal place of business in Los Angeles

///

1 County. Plaintiff ERST, Inc. is a Delaware corporation with its
2 principal place of business in Orange County.

3 4. The UNITED STATES OF AMERICA is a sovereign nation.

4 5. Defendant NATIONAL POLLUTION FUNDS CENTER (herein-
5 after "NPFC") is the entity that administers the federal Oil Spill
6 Liability Trust Fund established pursuant to the Oil Pollution Act
7 of 1990, 33 U.S.C. § 2701 et.seq., to provide funds for the payment
8 of claims for reimbursement of oil spill removal costs, among other
9 things. The NPFC is an agency of the United States of America,
10 within the Department of Transportation.

11 6. Defendant DANIEL SHEEHAN is, and at all relevant
12 times herein mentioned was, the Director of the National Pollution
13 Funds Center.

14 7. Defendant SOUTHERN CALIFORNIA REGIONAL RAIL AUTHOR-
15 ITY dba Metrolink (hereinafter "Metrolink") is, and at all times
16 herein mentioned was, a California public entity registered with
17 the State of California Secretary of State's office, doing business
18 as Metrolink, in the County of Los Angeles, California.

19 8. Defendant KRUZE & KRUZE CONSTRUCTION & ENGINEERING,
20 INC. (hereinafter "Kruze & Kruze") is, and at all times herein
21 mentioned was, a California corporation doing business in the
22 County of Los Angeles, California.

23 9. Defendant ECCO EQUIPMENT CORPORATION (hereinafter
24 "Ecco") is, and at all times herein mentioned was, a California
25 corporation doing business in the County of Los Angeles,
26 California.

27 10. Unocal is informed and believes, and based thereon
28 alleges, that Metrolink, Kruze & Kruze, and Ecco each was the

1 agent, joint venturer, an independent contractor or employee, of
2 each other, and in doing the things hereinafter alleged, each was
3 acting within the course and scope of said agency, joint venture,
4 and employment or independent contractor relationship with the
5 advance knowledge, acquiescence, or subsequent ratification of each
6 one of them.

7 11. In or about February 1995, Metrolink, Kruze & Kruze
8 and Ecco were engaged in the construction of a train station in the
9 city of Norwalk, California. Unocal owns and operates an under-
10 ground crude oil pipeline which passes beneath a portion of the
11 train station construction site.

12 12. On or about February 20, 1995, Metrolink, Kruze &
13 Kruze and Ecco were utilizing a Caterpillar 983 track loader to
14 excavate at the train station construction site in the vicinity of
15 Unocal's underground crude oil pipeline, in violation of the
16 California Pipeline Safety Act, California Government Code § 4216,
17 et. seq.¹ In the course of this excavation, the Caterpillar 983
18 track loader was operated in a negligent and otherwise unsafe and
19 improper manner striking and puncturing Unocal's pipeline and
20 causing the discharge of approximately 1,090 barrels of crude oil.

21 13. A portion of the oil travelled from the site of the
22 pipeline puncture through the adjacent underground storm drains
23 into the flood control channel system ultimately reaching the San

24 ///

25
26
27 ¹California's Pipeline Safety Act imposes a duty upon a person
28 excavating in the vicinity of underground oil pipelines and other
subsurface installations to excavate only with handtools until the
exact location of the underground pipeline is ascertained.
California Government Code § 4216.4(a).

1 Gabriel River, a navigable waterway of the United States, as
2 defined by 33 U.S.C. § 2701(21).

3 14. Unocal, as owner of the facility from which the oil
4 was discharged, complied with all of its obligations under federal
5 and state law to report the spill to the appropriate federal, state
6 and local authorities and to clean up and remove the spilled oil.
7 In accordance with the National Contingency Plan, Unocal estab-
8 lished an Incident Command System, with the active participation of
9 various federal and state officials, to execute the spill response
10 and activated its Emergency Strike Response Team, "ERST, Inc.," to
11 respond to the spill.

12 15. On or about February 21, 1995, Metrolink in a
13 meeting attended by representatives of Metrolink, Unocal/ERST, Inc
14 and California Department of Fish and Game, Office of Oil Spill
15 Prevention and Response, agreed to reimburse Unocal/ERST, Inc. for
16 all costs incurred responding to the spill. In the course of its
17 response, Unocal retained ERST, Inc. to render care, aid and
18 assistance in the removal effort and hired third party clean-up
19 contractors to remove the oil, restore the environment, and reha-
20 bilitate all affected wildlife. Efforts to restore the environment
21 continue to this day. Unocal/ERST, Inc. funded, and continues to
22 fund, the extensive clean-up and restoration efforts. Unocal/ERST,
23 Inc. also made payment to all the clean-up contractors. As a
24 result of its response, Unocal/ERST, Inc. has incurred removal
25 costs to date of \$4,657,542.40.

26 16. On April 6, 1995, June 16, 1995, and August 17,
27 1995, Unocal/ERST, Inc. demanded full payment from Metrolink for
28 all removal costs incurred as a result of the discharge of oil.

1 Despite these demands for payment, Defendant Metrolink refused, and
2 continues to refuse, to reimburse Unocal/ERST, Inc. for its removal
3 costs.

4 17. On September 15, 1995, Unocal/ERST, Inc. formally
5 presented a claim, pursuant to California Government Code § 900 et
6 seq. to Defendant Metrolink for reimbursement of oil spill response
7 and clean-up expenses by mailing copies of the claim to the secre-
8 tary and clerk of the Board of the Southern California Regional
9 Rail Authority pursuant to California Government Code § 915. On
10 October 10, 1995, Metrolink informed Unocal/ERST, Inc. by letter
11 that the claim had been denied.

12 18. On March 8, 1996, Unocal presented a written claim,
13 with substantial supporting evidence, to the NPFC for reimbursement
14 of the removal costs Unocal/ERST, Inc. incurred as a result of the
15 discharge of oil. Unocal's claim conformed, in all material
16 respects, to the requirements stated in 33 U.S.C. § 2713 and
17 applicable federal regulations.

18 19. On June 12, 1996, the NPFC, via letter from
19 Mr. J. Abramson, denied Unocal's claim for reimbursement. Unocal's
20 request was denied on the basis that Unocal had failed to demon-
21 strate that the discharge was caused solely by the act or omission
22 of a third party.

23 20. On August 7, 1996, Unocal submitted to the NPFC a
24 written request for reconsideration of the denial with additional
25 supporting evidence.

26 21. On October 9, 1996, in a letter written by Mr. D.W.
27 Calkins, Jr., the NPFC denied Unocal's request for reconsideration
28 on the basis that Unocal had failed to demonstrate that the dis-

1 charge was caused solely by the act of a third party. The denial
2 constituted final agency action by the NPFC.

3
4 CAUSES OF ACTION

5 FIRST CAUSE OF ACTION

6 (For Negligence Against Metrolink, Kruze & Kruze and Ecco)

7
8 22. Unocal/ERST, Inc. incorporates by this reference
9 each and all of the allegations contained in Paragraphs 1 through
10 21 of this Complaint as fully as though set forth at length herein.

11 23. Upon discovering Unocal's crude oil pipeline
12 traversing, underground, the location of Metrolink's construction
13 site, and at all times and places mentioned herein, Metrolink,
14 Kruze & Kruze and Ecco owed a general duty of care to Unocal, which
15 duty required that Metrolink, Kruze & Kruze and Ecco exercise
16 reasonable care in their construction activity so as not to cause
17 damage to Unocal's oil pipeline. Further, pursuant to California
18 Government Code § 4216.4(a), Metrolink, Kruze & Kruze, and Ecco
19 were under a statutorily imposed duty to use hand tools during
20 excavation to determine the exact location of the marked under-
21 ground pipeline. Metrolink, Kruze & Kruze, and Ecco negligently
22 breached these duties of care by knowingly engaging in an activity
23 which was likely to lead to the unlawful discharge of oil and by
24 negligently excavating and puncturing the pipeline as hereinbefore
25 alleged.

26 24. Metrolink, Kruze & Kruze and Ecco were under an
27 additional statutory duty, imposed by California Government Code
28 § 8670.25 upon any person who causes or permits oil to be dis-

1 charged on the waters of the State of California, to immediately
2 contain, clean up and remove the oil. Metrolink, Kruze & Kruze and
3 Ecco negligently breached this duty by failing to contain, clean up
4 and remove the oil.

5 25. As a direct and proximate result of the negligence
6 of Metrolink, Kruze & Kruze, and Ecco, Unocal's pipeline was
7 damaged, oil was permitted to enter navigable waters of the United
8 States and state marine waters, and Unocal was obligated to expend
9 substantial time, monies and effort to contain and remove the oil,
10 restore the environment and rehabilitate wildlife affected by the
11 spill as hereinbefore alleged. Unocal/ERST, Inc. has expended
12 substantial effort and money to repair the damage to the pipeline
13 and to clean up the resulting oil spill. Unocal lost 1090 barrels
14 of crude oil as a result of the pipeline puncture. Unocal also
15 lost the use of the pipeline for a period of time while the pipe-
16 line was being repaired.

17 WHEREFORE, Unocal/ERST, Inc. prays judgment against
18 Metrolink, Kruze & Kruze and Ecco, and each of them, as hereinafter
19 set forth.

20
21 SECOND CAUSE OF ACTION

22 (For Equitable Indemnity Against Metrolink,
23 Kruze & Kruze, and Ecco)
24

25 26. Unocal/ERST, Inc. incorporates by this reference
26 each and all of the allegations contained in Paragraphs 1 through
27 25 of this Complaint as fully as though set forth at length herein.

28 ///

27. Pursuant to the Federal Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, and California law, Unocal, as owner of the pipeline from which the oil spilled, is strictly liable for the removal costs and damages which resulted from the spill. As hereinbefore alleged, the spill occurred solely as the result of the negligent acts and omissions of Metrolink, Kruze & Kruze, and Ecco, and these parties should bear the related removal costs which Unocal/ERST, Inc. has paid to date. Unocal's responsibility is solely of a secondary nature, imposed by statute, based upon the direct and primary acts or misconduct of Metrolink, Kruze & Kruze and Ecco, and each of them, as set forth above, and by reason of the foregoing acts, Unocal is entitled to complete, total or full indemnification from Metrolink, Kruze & Kruze and Ecco, and each of them.

28. As a direct and foreseeable result of the negligence of Metrolink, Kruze & Kruze, and Ecco, Unocal, as the owner of the pipeline, has been forced to expend substantial efforts and sums of money to respond to the oil spill caused by Metrolink, Kruze & Kruze, and Ecco. By the acts hereinbefore alleged, Metrolink, Kruze & Kruze, and Ecco, have incurred an obligation to Unocal by reason of their negligence to indemnify Unocal/ERST, Inc. for the costs incurred by Unocal/ERST, Inc. for the oil spill clean up for which Metrolink, Kruze & Kruze, and Ecco are solely responsible.

29. Metrolink, Kruze & Kruze, and Ecco have failed and refused, and continue to fail and refuse, to reimburse Unocal/ERST, Inc. for the \$4,657,542.40 expended by Unocal/ERST, Inc. to remove the spilled oil despite Unocal/ERST, Inc.'s demand for same.

///

1 WHEREFORE, Unocal/ERST, Inc. prays judgment against
2 Metrolink, Kruze & Kruze, and Ecco, and each of them, as
3 hereinafter set forth.

4
5 THIRD CAUSE OF ACTION

6 (For Partial Indemnity and Apportionment of Fault
7 against Metrolink, Kruze & Kruze, and Ecco)
8

9 30. Unocal/ERST, Inc. incorporates by this reference
10 each and all of the allegations contained in Paragraphs 1 through
11 29 of this Complaint as fully as though set forth at length herein.

12 31. Unocal/ERST, Inc. alleges that Metrolink, Kruze &
13 Kruze, and Ecco are fully and completely responsible for the
14 removal costs alleged in this Complaint. However, in the alterna-
15 tive, if recovery is denied to Unocal/ERST, Inc. on its cause of
16 action for indemnity, and if Unocal is found to be in any way
17 negligent or otherwise responsible for any portion of the removal
18 costs, Unocal/ERST, Inc. seeks partial indemnity and apportionment
19 of fault from Metrolink, Kruze & Kruze, and Ecco, and each of them,
20 in accordance with the comparative fault attributable to each of
21 them for causing the removal costs alleged.

22 WHEREFORE, Unocal/ERST, Inc. prays judgment against
23 Metrolink, Kruze & Kruze, and Ecco, and each of them, as herein-
24 after set forth.

25
26 ///

27
28 ///

1 FOURTH CAUSE OF ACTION

2 (For Indebitatus Assumpsit Against
3 Metrolink, Kruze & Kruze, and Ecco)

4
5 32. Unocal/ERST, Inc. incorporates by this reference
6 each and all of the allegations contained in Paragraphs 1 through
7 31 of this Complaint as fully as though set forth at length herein.

8 33. Subsequent to the oil spill on February 20, 1995,
9 Metrolink, Kruze & Kruze, and Ecco became indebted to Unocal/ERST,
10 Inc. for removal costs in the sum \$4,657,542.40, for costs to
11 repair the damage to the pipeline in the sum of \$8,646.81 and for
12 the loss of 1,090 barrels of crude oil in the sum of \$16,153.80,
13 all of which represents money paid by Unocal/ERST, Inc. for the
14 account of Metrolink, Kruze & Kruze, and Ecco.

15 34. Unocal/ERST, Inc. has repeatedly demanded payment
16 from Metrolink. No payment has been made by any defendant to
17 Unocal/ERST, Inc., and there is now due, owing, and unpaid, the
18 sums of \$4,657,542.40 for removal costs, \$8,646.81 for pipeline
19 repair, and \$16,153.80 for lost oil, with interest on those amounts
20 at the legal rate, according to proof.

21 WHEREFORE, Unocal/ERST, Inc. prays judgment against
22 Defendants Metrolink, Kruze & Kruze, and Ecco, and each of them, as
23 hereinafter set forth.

24
25
26 ///

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28 ///

FIFTH CAUSE OF ACTION

(For Quantum Meruit against
Metrolink, Kruze & Kruze, and Ecco)

35. Unocal/ERST, Inc. incorporates by this reference each and all of the allegations contained in Paragraphs 1 through 34 of this Complaint as fully as though set forth at length herein.

36. On and after February 20, 1995, at Norwalk, California, Unocal/ERST, Inc. performed oil spill response services for Defendants Metrolink, Kruze & Kruze, and Ecco, which were necessitated by an oil spill solely caused by these defendants and their agents. Metrolink, Kruze & Kruze, and Ecco requested these clean-up services, knew that these services were being provided, and promised to reimburse Unocal/ERST, Inc. for the value of the services provided.

37. Unocal/ERST, Inc. has repeatedly demanded payment from Defendant Metrolink. The fair and reasonable value of the services provided to Metrolink, Kruze & Kruze, and Ecco by Unocal/ERST, Inc. is at least \$4,657,542.40. No payment has been made by any of these defendants to Unocal/ERST, Inc., and there is now due, owing, and unpaid, the sum of at least \$4,657,542.40.

WHEREFORE, Unocal/ERST, Inc. prays judgment against Metrolink, Kruze & Kruze, and Ecco, and each of them, as herein-after set forth.

///

///

SIXTH CAUSE OF ACTION

(For Breach of Oral Contract against Metrolink))

38. Unocal/ERST, Inc. incorporates by this reference each and all of the allegations contained in Paragraphs 1 through 37 of this Complaint as fully as though set forth at length herein.

39. On or about February 21, 1995, Unocal/ERST, Inc. and Metrolink entered into an oral contract witnessed by representatives of both parties and by representatives of California Department of Fish and Game, Office of Oil Spill Prevention and Response, whereby Unocal/ERST, Inc. agreed to conduct and oversee the oil spill clean-up in consideration for Metrolink's agreement to promptly pay Unocal/ERST, Inc. and its subcontractors for all services necessary in conducting the oil spill clean-up.

40. Unocal/ERST, Inc. has performed all conditions, covenants, and promises required to be performed by Unocal/ERST, Inc. in accordance with the terms and conditions of its contract.

41. On or about April 6, 1995, June 16, 1995, August 17, 1995, and October 10, 1995, Metrolink breached the terms of the oral contract by failing to pay Unocal/ERST, Inc. when payment was demanded.

42. As a result of Metrolink's breach of the contract, Unocal/ERST, Inc. has suffered damages in the sum of \$4,657,542.40.

WHEREFORE, Unocal/ERST, Inc. prays judgment against Metrolink as hereinafter set forth.

///

SEVENTH CAUSE OF ACTION

(For Recovery of Removal Costs Pursuant to 33 U.S.C. § 2702
against Metrolink, Kruze & Kruze, and Ecco)

43. Unocal/ERST, Inc. incorporates by this reference each and all of the allegations contained in Paragraphs 1 through 42 of this Complaint as fully as though set forth at length herein.

44. The Oil Pollution Act of 1990 provides in pertinent part that a pipeline owner may recover removal costs arising from the discharge of oil from a pipeline from a party whose acts or omissions were the sole cause of the discharge of oil, provided that the party causing the discharge was not the agent or employee of the pipeline owner and was not in a contractual relationship with the pipeline owner, and provided further that the pipeline owner exercised due care with respect to the oil concerned and took precautions against the foreseeable acts or omissions of the party causing the discharge.

45. Unocal/ERST, Inc. is informed and believes, and thereon alleges, that the discharge of oil hereinbefore alleged, and the resulting damages and removal costs, were caused solely by the acts or omissions of Metrolink, Kruze & Kruze, and Ecco, who were neither the agents nor employees of Unocal. The discharge of oil did not occur in connection with any contractual relationship between Unocal/ERST, Inc. and Metrolink, Kruze & Kruze or Ecco.

46. Unocal/ERST, Inc., at all relevant times, exercised due care with respect to the oil by, among other things, visiting the construction site and carefully marking the location and

///

1 alignment of the pipeline in full compliance with California's
2 Pipeline Safety Act, California Government Code § 4216, et.seq.

3 47. Unocal/ERST, Inc. is informed and believes, and
4 thereon alleges, that Metrolink, Kruze & Kruze, and Ecco are the
5 parties responsible for the removal costs incurred by Unocal/ERST,
6 Inc. as a result of the pipeline puncture and ensuing oil spill.

7 WHEREFORE, Unocal/ERST, Inc. prays judgment against
8 Metrolink, Kruze & Kruze and Ecco, and each of them, as hereinafter
9 set forth.

10
11 EIGHTH CAUSE OF ACTION

12 (For Declaratory Relief against Metrolink,
13 Kruze & Kruze, and Ecco)

14
15 48. Unocal/ERST, Inc. incorporates by this reference
16 each and all of the allegations contained in Paragraphs 1 through
17 47 of this Complaint as fully as though set forth at length herein.

18 49. An actual controversy has arisen and now exists
19 between Unocal/ERST, Inc. and Metrolink, Kruze & Kruze, and Ecco,
20 concerning their respective rights and duties in that Unocal/ERST,
21 Inc. contends that Metrolink, Kruze & Kruze, and Ecco are the
22 responsible parties for the purpose of determining liability, under
23 the Federal Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.,
24 for removal costs incurred by Unocal, which resulted from the
25 pipeline puncture.

26 50. Unocal/ERST, Inc. desires a judicial determination
27 of its rights and duties, and a declaration of Metrolink's, Kruze

28 ///

1 & Kruze's, and Ecco's status as the "Responsible Parties" under the
2 Federal Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.

3 51. A judicial declaration is necessary and appropriate
4 at this time in order that Unocal/ERST, Inc.'s rights under 33
5 U.S.C. § 2701 et seq. can be formally recognized and in order to
6 permit Unocal/ERST, Inc. to recover from Metrolink, Kruze & Kruze,
7 and Ecco the removal costs incurred as a result of the pipeline
8 puncture and oil spill.

9 WHEREFORE, Unocal/ERST, Inc. prays judgment against
10 Metrolink, Kruze & Kruze, and Ecco, and each of them, as herein-
11 after set forth.

12
13 NINTH CAUSE OF ACTION

14 (For Judicial Review of Final Agency Action Pursuant to

15 5 U.S.C. § 702 against the United States

16 and Daniel Sheehan, as the Director of the NPFC)

17
18 52. Unocal/ERST, Inc. incorporates by this reference
19 each and all of the allegations contained in Paragraphs 1 through
20 51 as fully as those set forth at length herein.

21 53. The Oil Pollution Act of 1990 provides, in 33 U.S.C.
22 §§ 2703, 2708 and 2713, that a pipeline owner is entitled to reim-
23 bursement from the NPFC for removal costs incurred as the result of
24 the discharge of oil from its pipeline if the pipeline owner estab-
25 lishes by a preponderance of the evidence that the discharge of oil
26 and resulting removal costs were caused solely by the acts or omis-
27 sions of a third party, who is not an employee or agent of the
28 pipeline owner and with whom the pipeline owner does not have a

1 contractual relationship, provided that the pipeline owner estab-
2 lishes by a preponderance of the evidence that the pipeline owner
3 exercised due care with respect to the oil concerned and took pre-
4 cautions against the foreseeable acts or omissions of the third
5 party.

6 54. The discharge of oil and resulting removal costs
7 were caused solely by the acts or omissions of Metrolink, Kruze &
8 Kruze, and Ecco. At all relevant times, no contractual rela-
9 tionship existed between Unocal and Metrolink, Kruze & Kruze, or
10 Ecco. At all relevant times, Unocal exercised due care with
11 respect to the oil and the underground pipeline and took adequate
12 precautions to prevent the discharge of oil by, among other things,
13 properly marking the location of the underground oil pipeline such
14 that excavation, if properly performed, could take place without
15 damaging the pipeline.

16 55. Unocal is not responsible for the spill; rather,
17 Metrolink, Kruze & Kruze, and Ecco are solely responsible for the
18 spill of February 20, 1995, as was acknowledged by them in their
19 agreement to fully reimburse Unocal/ERST, Inc.

20 56. The claim which Unocal submitted to the NPFC on
21 March 8, 1996, together with Unocal's written request for recon-
22 sideration submitted to the NPFC on August 7, 1996 demonstrated by
23 a preponderance of the evidence that the discharge of oil and
24 resulting removal costs were caused solely by the acts or omissions
25 of third parties, specifically Metrolink, Kruze & Kruze and Ecco.
26 Despite Unocal's showing that it was entitled to reimbursement, the
27 NPFC denied Unocal's claim. The NPFC's action, in light of the
28 evidence which Unocal provided to the NPFC, was arbitrary, capri-

cious, an abuse of discretion, or otherwise not in accordance with law or the NPFC's governing regulations, was unsupported by the evidence and contrary to representations made by Metrolink and Kruze & Kruze contemporaneously with the response efforts, and was unwarranted by the facts such that Unocal is entitled to judicial review of the NPFC's action.

57. Unocal is entitled to reimbursement from the NPFC for the removal costs associated with the clean-up of the spill, in the amount of \$4,657,542.40.

WHEREFORE, Unocal prays judgment against the United States and Daniel Sheehan, as the Director of the National Pollution Funds Center, and each of them, as hereinafter set forth.

PRAYER

On the FIRST, SECOND, THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH CAUSES OF ACTION:

(1) for removal costs in the amount of \$4,657,542.40 incurred to date, and for future removal costs to be incurred, in responding to the oil spill;

(2) for compensatory damages for loss of oil and pipeline repair according to proof at trial;

(3) for interest as allowed by law;

(4) for costs of suit incurred, including attorneys' fees; and

(5) for such other and further relief as the Court may deem proper.

On the EIGHTH CAUSE OF ACTION:

(1) for declaration that Defendants Metrolink, Kruze & Kruze, and Ecco are the responsible parties for the purposes of determining liability under the Federal Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*; and

(2) for removal costs incurred by Unocal as a result of the pipeline puncture and ensuing oil spill;

(3) for such other and further relief as the Court may deem proper.

On the NINTH CAUSE OF ACTION:


(1) that this Court order the NPFC to reimburse Unocal for all removal costs which Unocal incurred responding to the subject discharge of oil;

(2) for interest as allowed by law;

(3) for costs of suit incurred, including attorneys' fees, and

(4) for any other relief to which Unocal may show itself entitled under law or equity.

Dated: January 2, 1997


WILLIAM H. COLLIER, JR.

JOSEPH A. WALSH II

JOHN M. WHELAN

KEESAL, YOUNG & LOGAN

ELLEN A. WHELAN

Assistant Counsel/Legal Affairs
CALIFORNIA OPERATING SERVICES
UNOCAL CORPORATION

Attorneys for UNOCAL CORPORATION,
UNION OIL COMPANY OF CALIFORNIA and
ERST, INC.

LODGED
IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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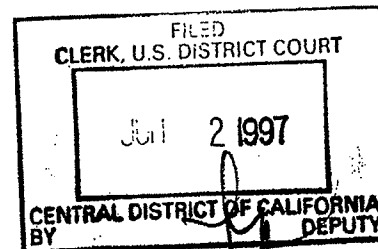
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
UNOCAL CORPORATION, UNION CITY
COMPANY OF CALIFORNIA, and ERST,
INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE
NATIONAL POLLUTION FUNDS CENTER,
DANIEL SHEEHAN as the DIRECTOR OF
THE NATIONAL POLLUTION FUNDS
CENTER, THE SOUTHERN CALIFORNIA
REGIONAL RAIL AUTHORITY dba
METROLINK, KRUZE & KRUZE
CONSTRUCTION & ENGINEERING, INC.,
and ECCO EQUIPMENT CORPORATION,

Defendants.



Case No. 97-0024 RSWL(RCx)

ORDER

AND NOW, this 19th day of MAY, 1997, upon
consideration of the United States' Motion to Dismiss Claim for
Monetary Relief and to Stay Proceeding with Regard to the United
States, and the Court being fully advised in the premises, it is
hereby ORDERED AND ADJUDGED that:

1. Pursuant to Fed. R. Civ. P. 12(b), the United States'
motion to dismiss Plaintiffs' claim seeking monetary relief
against the United States is granted on the grounds that there
has been no waiver of sovereign immunity under the Administrative
Procedure Act, 5 U.S.C. § 702, et seq., which would allow this
Court to award monetary damages, and therefore, subject matter

EXHIBIT D

ENTERED ON ICMS

JUN 06 1997

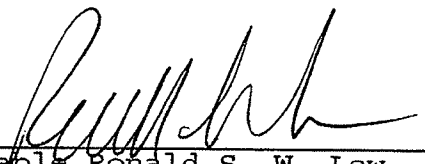
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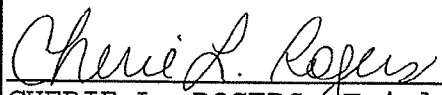
1 jurisdiction is lacking to award such relief as Plaintiffs have
2 prayed for; and

3 2. In the interest of judicial economy and for good cause
4 shown, the proceeding against the United States shall be held in
5 abeyance (including the filing of the administrative record)
6 until further order of this Court.

7 IT IS SO ORDERED.

8
9 
10 Honorable Ronald S. W. Lew
11 United States District Judge
12
13
14
15
16
17

18 Presented by:

19 
20 CHERIE L. ROGERS, Trial Attorney
21 United States Department of Justice
22 Environment and Natural Resources Div.
23 Environmental Defense Section
24 P.O. Box 23986
25 Washington, DC 20026-3986
26 Telephone No. (202) 514-3701
27
28 Attorney for DEFENDANT THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the proposed ORDER has been sent by first class mail to the following counsel of record on May 21st, 1997:

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